IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

MICHAEL LESCH
Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Attorneys for Tuscan Dairy Farms, Inc., Appellant

Of Counsel
MILTON S. GOULD
MICHAEL LESCH
SANFORD A. BELL
DALE C. CHRISTENSEN, JR.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Opinions Below

The opinion, reported at 45 N.Y.2d 215 (1978), and remittitur of the New York Court of Appeals affirming the judgment of the Appellate Division are set forth in Appendix A hereto.

The opinion of the New York Appellate Division, reported at 58 App. Div. 2d 491, 397 N.Y.S.2d 446 (3d Dept. 1977), and order entered thereon, confirming the determination of the Commissioner, which denied appellant's application for an extension of its milk dealer's license, and dismissing the petition seeking annulment of the denial are set forth in Appendix B hereto. The Commissioner's Memorandum, Findings of Fact, Conclusion and Determination are set forth at Appendix C hereto.

Statement of the Grounds on which the Jurisdiction of this Court is Invoked

In a civil proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules, appellant challenged the determination of the Commissioner denying appellant's application for an extension of its milk dealer's license in New York, pursuant to Section 258-c (2) and (3) of the New York Agriculture and Markets Law, to permit it to sell at wholesale in Richmond County, New York, milk transported from New Jersey. The Commissioner's determination was based on the ground that granting the requested license extension "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest" (38a).[1]

1. Numbers in parentheses followed by "a" refer to pages of appendices; numbers preceded by "A" refer to pages of the record on appeal in the Court of Appeals.

Appellant asserted, in its pleadings and at all stages of the appeal that Section 258-c (2) and (3) of the New York Agriculture and Markets Law, as applied by the Commissioner, is repugnant to the Commerce Clause of the United States Constitution (U.S. Const., Art. 1, sec. 8, cl. 3). The decision of the Court of Appeals upheld the constitutionality of Section 258-c (2) and (3) of the Agriculture and Markets Law, as applied by the Commissioner, and expressly rejected appellant's contentions based on the Commerce Clause (45 N.Y.2d at 222-230; 7a-18a).

The final judgment sought to be reviewed is the decision and judgment made and entered on July 11, 1978 by the New York State Court of Appeals (Appendix A) which affirmed the order of the New York Appellate Division, Third Department which in turn confirmed the determination of the Commissioner. On October 6, 1978 the Notice of Appeal was filed with the New York State Supreme Court, Albany County, the court possessed of the record. A copy thereof, with proof of service, is set forth in Appendix D hereto.

Jurisdiction of the Supreme Court to review the decision and judgment herein is conferred by 28 U.S.C. § 1257(2).

Statute Involved

Section 258-c of New York Agriculture and Markets Law, the statute involved, provides that the Commissioner may refuse permission to sell milk in New York based on a finding that such sale will "tend to a destructive competition in a market already adequately served." The statute reads as follows:

258-c. *Granting and revoking licenses*

> "No license shall be denied to a person not now engaged in business as a milk dealer, or for the continuation of a now existing business, and no license

shall be denied to authorize the extension of an existing business by the operation of an additional plant or other new additional facility, unless the commissioner finds by a preponderance of the evidence, after due notice and opportunity of hearing to the applicant or licensee, one or more of the following: (1) that the applicant is not qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business, provided however, that no new application shall be denied solely for the reason of inadequate equipment if it is shown that provision has been made for the acquisition of same; (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest."

Questions Presented

1. Whether the Commissioner's determination pursuant to Section 258-c of the New York Agriculture and Markets Law, absolutely excluding the sale of milk in interstate commerce at wholesale in Richmond County, New York, by appellant (otherwise found to be wholly qualified to sell milk in New York) solely on the ground that such exclusion protects local competition, is prohibited by the Commerce Clause of the United States Constitution?

2. Whether the absolute exclusion by New York State of appellant's interstate sales of milk in Richmond County may be justified on the ground that the State did not have "as its avowed purpose the exclusion of competition from out of State for the protection of the economic well-being of the milk industry within the State" (45 N.Y.2d at 225; 11a)?

Statement of the Case

Appellant, a New Jersey milk dealer, upon receiving a request from Pathmark Supermarkets ("Pathmark"), a supermarket chain which it serves in New Jersey, to supply Pathmark stores in Richmond County, New York (Findings ¶5, 31a-32a), filed an application in May, 1975 with the New York Department of Agriculture and Markets for a license extension permitting deliveries at wholesale, in that county, of milk processed in New Jersey. (Findings ¶2, 31a). A hearing was held July 15, 1975.

Although he denied appellant's application, the Commissioner specifically found that such denial was not based on any ground such as health (Findings ¶¶2, 3; 31a), safety (*Id.*), equipment (Findings ¶2, 31a), or financial responsibility (Findings ¶14, 34a). He stated:

> "On the basis of the record, it can not be concluded that applicant's request for extension of its milk dealer's license to Richmond County should be denied for reason of character or experience or financial responsibility or equipment properly to conduct the proposed business" (Conclusions, 38a).

The sole ground recited in the Commissioner's determination for denying appellant's application was that under §§258-c (2) and (3), permission to sell in interstate commerce "would tend to a destructive competition for milk sales in a market already adequately served and *as such* would not be in the public interest" (38a, emphasis added).

Appellant thereupon instituted a proceeding seeking review of the Commissioner's determination. Pursuant to CPLR § 7804(g) the proceeding was transferred on consent from the New York Supreme Court, Albany County, to the Third Department of the Appellate Division of the New York Supreme Court. Appellant's verified petition therein raised the constitutional question this Court is asked to review as follows (par. 12):

> "By reason of the foregoing, section 258-c (2) of the Agriculture and Markets Law of the State of New York, as construed and applied by respondent, effects an unreasonable burden upon interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution . . . ." (A15).

The Commerce Clause issues were also raised in appellant's briefs to the Appellate Division and its Statement pursuant to CPLR 5531.

On August 18, 1977, the Appellate Division confirmed the determination of the Commissioner and dismissed appellant's petition finding that the Commissioner's application of § 258-c did not violate the Commerce Clause (58 App. Div. 2d 491; 24a-28a).

Appellant appealed to the Court of Appeals from the Appellate Division's order, again specifically raising the constitutional questions sought to be reviewed here in its Statement Pursuant to Rule 5531 of the New York Civil Practice Law and Rules (A2) and Notice of Assertion of Unconstitutionality (A310) filed with the Court of Appeals, in its briefs and arguments presented to the Court of Appeals, and in its pleadings which were part of the record before the Court of Appeals (A11-A16).

The Court of Appeals decided against appellant on the ultimate issue presented on this appeal by affirming the judgment of the Appellate Division and stating that the "denial by the Commissioner of Agriculture and Markets of a license to extend delivery of milk on a wholesale basis into the County of Richmond to a New Jersey dealer already licensed to supply and supplying milk in other counties of the State did not violate the Commerce Clause of the United States Constitution" (45 N.Y.2d at 218; 1a).

The Court of Appeals recognized that this Court's decision in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935) constitutes "unquestioned authority . . . for the proposition that legislation enacted solely for the protection of local economic interests by the restriction of competition from without the State is inherently unconstitutional" (45 N.Y. 2d at 224; 9a) and candidly admitted that it knew of no decision of this Court upholding the validity under the Commerce Clause of exclusionary action such as that taken by the Commissioner here (*Id.* at 222; 7a).

Nevertheless, the Court of Appeals, disregarding the clear language of the Commissioner's determination (38a), concluded that the "cardinal and distinguishing significance" of this case "is the fact that the Commissioner's denial of the license sought by [appellant] did not have as its objective the economic protection of the milk industry of New York State, or even that of the County of Richmond" (45 N.Y.2d at 225; 11a). The apparent basis for this conclusion was the Court's reading of the Commissioner's determination as one "addressed . . . to the maintenance of the existing 'balanced milk distribution structure'" (*Id.* at 225; 11a-12a), which, while admittedly "provid[ing] a measure of economic protection to businesses already operating within the existing system" was nevertheless thought to be "in the public interest" (*Id.* at 226; 12a).

The Court further concluded that Section 258-c, as applied by the Commissioner, was valid under the Commerce Clause because it did not have as its "avowed purpose" the "exclusion of or discrimination against competition originating without the State" (*Id.* at 226; 13a) and had "no aspiration to affect or regulate the milk industry outside the boundaries of New York" (*Id.* at 227; 14a).

Facts of the Case

At the hearing on appellant's application, eight of the nine witnesses presented by the Department of Agriculture and Markets represented milk dealers then operating in Richmond County. Obviously, their testimony was colored by the desire to prevent competition from a highly successful newcomer. The remaining witness presented the identical statistics about the Richmond County milk market that had been offered at the prior hearing as to Elmhurst Milk and Cream Co., Inc., a New York distributor whose application to distribute within Richmond County had been granted only four months prior to the hearing (A40-A43).

These statistics showed that, as of February, 1975, 17 dealers were licensed to distribute milk at wholesale in Richmond County. Of these, 16 were New York dealers (A263). The record also revealed that ten New York dealers had been granted permission to sell within Richmond County in the year prior to the hearing (A263) and that these included six licensed to sell at wholesale (*Id.*). While there was testimony in the record that the entry of new dealers in the past had been accompanied by a period of intensified price competition (A118), there was also testimony that these periods were followed by a levelling-off stage when "the new distributor finds his place in the market" (A123) and that such periods of intensified competition would periodically occur whether or not a new competitor entered the market (A122-A123). Significantly, there was no evidence that any milk dealer had been driven out of business (or was in danger of being driven out of business) during any such periods of intensified price competition.

The evidence demonstrated the interest of all processors and distributors in handling accounts of every size. Weissglass, the distributor with the largest sales in the County (A261) testified that it served customers of every size,

from supermarket chains to vegetable stands and home delivery (A115). Elmhurst, the largest processor dealing in Richmond County according to the record (A153) served "fruit stores, meat stores, dairy stores, deli's and small stores" (A134). Queens Farms, another large-scale enterprise, characterized its sales to "stores, deli's, nursing homes, dairy stores, and 7-11's" as "peanuts", but testified that "all the peanuts make up a big volume" (A151). The testimony of the other Richmond County dealers was consistent on this point. And the testimony of Tuscan on the range of customers it served where it currently is licensed was no different (A217).

In sum, the only evidence in the record was that large-scale distributors, including Tuscan, served customers of all sizes and that Tuscan's interest in supermarket accounts in the County derived from a specific request by a chain served by Tuscan (A202).

There was no evidence that any Richmond County dealers were operating at a deficit or were in danger of going out of business. There was no attempt to determine whether, should one or more dealers cease activity in Richmond, there would be a lack of interest of other dealers in serving any abandoned accounts. There was no attempt to project the amount and type of business which might be adversely affected by Tuscan's entry. Similarly, there was no attempt to determine whether the increased population in Richmond County[2] would not offset, in the long run, any temporary losses of business to Tuscan. No expert witness was produced to analyze the intensity of competition in Richmond County or the impact of a new entry into the market.

---

2. The Commissioner has noted that the County population increased by 33% in the 1960's (Findings ¶8, 32a-33a) and was anticipated to have increased an additional 8% by 1975. (A40).

THE QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL

1. The Absolute Exclusion Of The Sale Of Milk In Interstate Commerce At Wholesale By Appellant (Otherwise Found Wholly Qualified To Sell In New York) On The Ground That Such Exclusion Protects Local Competition Is Prohibited By The Commerce Clause.

This Court has consistently held that a state has no power to prohibit the sale of goods in interstate commerce solely for the protection of local economic interests, *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935); *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949).[3] This principle was unavoidably recognized in the majority opinion of the Court below which stated (45 N.Y.2d at 224; 9a):

> "There is unquestioned authority, on which [appellant] relies, for the proposition that legislation enacted solely for the protection of local economic interests by the restriction of competition from without the State is inherently unconstitutional".

Ignoring its own analysis of the controlling decisions of this Court, however, the Court of Appeals held that the Commissioner's absolute prohibition of appellant's interstate sales of milk in Richmond County, New York could be justified as a measure on the sole ground of preserving the existing local competitive and distribution structure. In so holding the Court below clearly erred.

Thus, in *Baldwin*, this Court (by Cardozo, J.) held that a New York regulation prohibiting the sale of milk from outside New York unless the price paid to the non-New Yorker was one that would be lawful upon a like transaction within New York violated the Commerce Clause.

3. Appellee conceded in its brief to the Court of Appeals that a sale at wholesale from appellant to a New York supermarket is "an exclusively interstate transaction" (p. 8).

The Court observed that New York conceded it "has no power to project its [price control] legislation" on transactions in Vermont and continued (294 U.S. at 521):

> "New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed."

In *Hood*, this Court held that Section 258-c(2)—the very same provision at issue in this case—could not be applied to foreclose transactions in interstate commerce. And in *Hood*, the Commissioner made the very same concession made in *Baldwin*. As the Court stated (336 U.S. at 531):

> "The State agreed then [in *Baldwin*], as now [in *Hood*], that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State."

Indeed, even the Court of Appeals recognized at one point in its opinion that an absolute prohibition of the movement of milk in New York is prohibited, although regulation is permitted. The Court of Appeals stated (45 N.Y.2d at 222-223; 7a-8a):

> "We find no decision [of the Supreme Court] which is squarely dispositive. The cases which have upheld state regulation of commerce in milk and dairy products against challenges under the commerce clause have presented predominantly issues of local price *regulation* [as opposed to outright prohibition], and are thus distinguishable from the present case." (emphasis added.)

Nonetheless, the Court of Appeals refused to apply the principles of *Baldwin* and *Hood* to this case. It found of "cardinal and distinguishing significance" the fact that the Commissioner's action "did not have as its objective the

economic protection of the milk industry of New York State" (45 N.Y.2d at 225; 11a). It continued (*Id.* at 225-226; 11a-12a):

> "The commissioner's concern in this instance was addressed rather to the maintenance of the existing 'balanced milk distribution structure', and particularly the portion of the present distribution system which provides 'service on retail home delivery routes and service to small volume wholesale customers', the small outlets and mom and pop stores, which individually and collectively serve consumer needs not met by supermarkets and warehouse type outlets".

The Court of Appeals then characterized the foregoing as "necessary to serve the varied needs of milk consumers in Richmond County" (*Id.* at 226; 12a) and a "consumer protection" measure (*Id.* at 228; 16a).

The purported distinction of this case from *Baldwin* and *Hood* is insupportable for two reasons. *First,* the Commissioner's determination recites as the *sole* ground for its exclusion of appellant from Richmond County, that appellant's entry "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest" (38a). Thus the Commissioner has admitted the palpably protectionist basis for his decision, a basis which is also set forth in the words of § 258-c(2). The attempt of the Court of Appeals to transform the Commissioner's admitted economic protectionism into a consumer-oriented determination is wholly without support in the record.[4]

Second, in *Baldwin* this Court rejected virtually the identical argument used by the Court of Appeals in this case, stating (294 U.S. at 522-23):

4. Thus, there is nothing in the record as to any "consumer needs" met by "mom and pop stores" or "small outlets" which are not met by supermarkets.

> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the *maintenance of a regular and adequate supply* of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New York, supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate, the state intervenes to make its inhabitants healthy, and not to make them rich. *On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception.* Economic welfare is always related to health, for there can be no health if men are starving. *Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether.* To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." (emphasis added.)

Clearly, New York State has no more valid interest in maintaining a "balanced milk distribution structure" here than it had in *Baldwin* in the "maintenance of a regular and adequate supply of pure and wholesome milk." The argument made here that the existing competitive structure is necessary to "serve consumer needs" (without ever

explaining why) is no more persuasive than that the price regulation at issue in *Baldwin* was "a special form of sanitary security." *Baldwin* is dispositive of the issues in this case. As Judge Jasen noted in his dissenting opinion below, the attempt to disguise economic goals as consumer measures (45 N.Y.2d at 231-32; 20a):

> "constitutes nothing more than a subtle variant of the bootstrap argument that regulation of competition—an impermissible local interest—will in itself contribute to health—a permissible local interest. Needless to say, the Supreme Court has consistently rejected this argument. (See, e.g., *Hood & Sons* v. *DuMond*, 336 U.S. 525, 538, *supra*; *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 522-23, *supra*; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316.)"

The sole basis upon which the Court of Appeals sought to distinguish *Baldwin* was its statement that "[u]nlike *Baldwin* (294 U.S. 511, *supra*) and *A&P Tea Co.* (424 U.S. 366, *supra*) there is here no aspiration to affect or regulate the milk industry outside the boundaries of New York" (45 N.Y.2d at 227; 14a).

We respectfully submit that this fact cannot distinguish *Baldwin* for several reasons. First, the Commissioner's action here had a far more egregious effect on transactions in New Jersey, than the regulation in *Baldwin* had on transactions in Vermont. Here the transaction was prohibited outright[5] whereas in *Baldwin*, New York merely sought to regulate the price of the milk sold in Vermont.

5. The Commissioner in a recent statement of policy acknowledged that dealers are precluded from delivery of milk in areas where they are unlicensed, regardless of arrangements as to passage of title. The Commissioner's licensing policy procedures state in relevant part:

> "A milk dealer may sell or distribute milk only to customers and accounts (including other milk dealers) within those markets or areas where he is duly licensed. He is precluded from arranging for f.o.b. or dock sales or other means of serving potential customers in other markets or areas regardless of the arrangements or methods which may be devised for the sale and delivery of the milk."

"Milk Dealer Licensing Policy and Procedures", Memorandum of the Department of Agriculture & Markets, at Part III, § 1(d) (March 1, 1976). A complete copy of the Department's Memorandum is set forth as Appendix E hereto.

Moreover, whether or not the delivery takes place in New Jersey or New York (depending on whether Tuscan delivers the goods to Richmond County or Pathmark sends its truck to New Jersey to receive the milk) makes no difference.

Thus, in *Schwegmann Bros. Giant S. Mkts.* v. *Louisiana Milk Comm.*, 365 F.Supp. 1144 (M.D. Louisiana 1973), *aff'd* 416 U.S. 922 (1974), the Court held that the Commerce Clause prevented the Louisiana Milk Commission, acting under the Louisiana statute, from requiring Schwegmann, a Louisiana retailer, to pay Pure Vac, a Tennessee manufacturer of frozen desserts, the minimum prices fixed by the Commission. The Court also held that the result would be the same even if the goods were carried into Louisiana by the seller, stating (365 F.Supp. at 1155):

> "Under *Baldwin* there can be no doubt that Louisiana could not regulate the price paid Pure-Vac if Schwegmann purchased the ice milk in Tennessee and it was shipped to Louisiana by common or contract carrier. And we fail to see why that result should change merely because instead of shipping the goods into Louisiana by common carrier, Pure-Vac transports them by its own trucks as long as (1) the ice milk was produced in Tennessee, (2) title passed there, and (3) Pure-Vac conducts no other business operation in Louisiana other than its delivery, as bailee, of ice milk it has sold to a Louisiana retailer. If on the other hand Pure-Vac sold its ice milk in Louisiana, that is if title passed here, as for example, if it conducted a store-to-store peddling operation, it would be doing business in Louisiana and subject to regulation here."

Here, it is clear that (1) the milk is processed in New Jersey (Findings ¶2, 31a) and that the Commissioner's Order prohibited sales to Pathmark, a New York supermarket, even if (2) title were to pass in New Jersey and (3) Tuscan were to conduct no other business operations in New York other than delivery of its milk to New York retailers. It is also clear that Tuscan is not conducting a "store-to-store peddling operation."

Since this Court affirmed *Schwegmann*, it disposed of the case on the merits and thereby indicated that the *Schwegmann* court correctly interpreted the prevailing rule. If the Commissioner in this case (as in *Schwegmann* and *Baldwin*) had merely fixed the prices of sales from Tuscan to Pathmark, that would have violated the Commerce Clause under *Schwegmann* and *Baldwin*. But here, the Commissioner went even further. He prohibited sales outright, an even clearer violation of principles which have been the constitutional law of the land for more than forty years.

2. The Absolute Exclusion By New York State Of Appellant's Interstate Sales Of Milk In Richmond County Cannot Be Justified On The Ground That The State Did Not Have "As Its Avowed Purpose The Exclusion of Competition From Out of State For The Protection of the Economic Well-Being of the Milk Industry Within The State" (45 N.Y. 2d at 225; 11a).

The Court of Appeals attempted to distinguish this case from *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949) and *A&P Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976) on the ground that Section 258-c and the Commissioner's action did not have as their "avowed purpose" the "discrimination against competition originating without the State" (45 N.Y.2d at 225, 226; 11a, 13a). It also stated (*Id.* at 227; 14a):

> "No reference is made in the statute to the source of of the competition, whether from within the State or without. That the absence of such a distinction is a significant factor in viewing applications of the statute adverse to an out-of-State dealer, see *Panhandle Co.* v. *Michigan Comm.* (341 U.S. 329, 337). Moreover, and equally significant, nothing in the record indicates that commissioner's application of the statute in this instance or in general has been other than evenhanded in treatment of interstate and intrastate commerce alike."

This Court has never recognized the absence of "avowed" discrimination as a justification for exclusionary action for economic ends. While this Court has referred to "discrimination" in a Commerce Clause context, it has made clear that no discriminatory intent is required and that the *exclusion* of interstate commerce to protect or preserve local economic interests is *per se* "discriminatory". This Court so held in *Panhandle E. P. Co.* v. *Michigan Public Service Comm.*, 341 U.S. 329, 337 (1951) (a case which the majority's opinion relies on as supporting a contrary result) when it characterized *Hood* as a case:

> ". . . where a state was said to have discriminated against interstate commerce *by prohibiting* it because it would subject local business to competition." (emphasis added.)

It is this type of "discrimination" that the Commerce Clause forbids regardless of whether the discrimination favors some local competitors (as in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951)) or all local competitors as in (*Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964)).

Thus, in *Dean Milk Co.* v. *City of Madison, supra*, this Court held that the ordinance in question violated the Commerce Clause, notwithstanding the fact that the ordinance

did not "discriminate" against interstate commerce, holding (340 U.S. at 354, fn. 4):

> "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."

In *Dean* this Court was confronted with an attempt by the City of Madison, Wisconsin to justify a milk pasteurization ordinance by claiming that it was actually a health measure for the benefit of milk consumers. This Court, reaffirmed *Baldwin* and again rejected economic protectionism in the guise of a health measure, stating (340 US. at 354):

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause itself imposes no limitations on State action other than those laid down by the Due Process Clause, save for the rare instance where a State artlessly discloses an avowed purpose to discriminate against interstate goods."

Accord: *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Toomer* v. *Witsell*, 334 U.S. 385, 403-06 (1948).

The Court below also contravened this Court's recent decision in *City of Philadelphia* v. *New Jersey*, —— U.S. ——, 46 U.S.L.W. 4801 (June 23, 1978) which held that a New Jersey statute violated the Commerce Clause notwithstanding its professed concern for preservation of the environment, stating (p. 4803):

> "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. See e.g., *Hood & Sons* v. *DuMond*, *supra*; *Toomer* v. *Witsell*, 334 U.S. 385, 403-06; *Baldwin* v. *G.A.F. Seelig*, *supra*; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. Cf. *Welton* v. *Missouri*, 91 U.S. 275."

The present case—where the Court of Appeals professes concern for the "existing balanced milk distribution structure"—is the "clearest example" of state legislation effecting "simple economic protectionism"—"a law that overtly blocks the flow of interstate commerce at a State's borders." Time and again this Court has rejected such efforts.

The present appeal has great significance as to the continued attempt by New York to practice economic protectionism and as to the question whether the enormous burden of proving "discriminatory" intent is to be required in order to overcome state exclusionary action with candidly economic ends. The decision below presents many significant issues warranting review by this Court.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted and the judgment reversed.

Dated: New York, New York
October 9, 1978

Respectfully submitted

MICHAEL LESCH
Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Attorneys for Tuscan Dairy Farms, Inc., Appellant

Of Counsel

MILTON S. GOULD
MICHAEL LESCH
SANFORD A. BELL
DALE C. CHRISTENSEN, JR.

Appendices

APPENDIX A

Opinion and Judgment Appealed From

In the Matter of TUSCAN DAIRY FARMS, INC., Appellant, v J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York, Respondent.

Argued June 1, 1978; decided July 11, 1978

OPINION OF THE COURT

JONES, J.

We hold in this case that the denial by the Commissioner of Agriculture and Markets of a license to extend delivery of milk on a wholesale basis into the County of Richmond to a New Jersey dealer already licensed to supply and supplying milk in other counties of the State did not violate the commerce clause of the United States Constitution.[1]

The dealer appeals as of right on constitutional grounds in a proceeding pursuant to CPLR article 78 from a judgment of the Appellate Division which unanimously confirmed the determination by the commissioner, after a hearing, denying petitioner's application for an extension of its milk dealer's license into Richmond County and dismissed the petition which sought annulment of the denial.

Petitioner Tuscan, a New Jersey corporation, is a processor and seller of milk and milk products doing business in New Jersey, New York, Delaware, Pennsylvania and Massachusetts. It holds a milk dealer's license issued by the Department of Agriculture and Markets of the State of New York and for some 20 years has made wholesale deliveries of milk and milk products into Orange and

1. (US Const, art I, § 8, subd 3.)

Rockland Counties and deliveries of other dairy products in most of the remaining counties in the State. Its present business in the State is wholesale only, and its customers include supermarkets, institutional outlets serving schools and hospitals, and the so-call "mom and pop stores".

After Pathmark, one of the supermarket chains to which it delivered its products in New Jersey, had requested it to undertake supplying the chain's stores on Staten Island (Richmond County), on May 28, 1975 petitioner filed an application for an extension of its milk dealer's license with the Commissioner of Agriculture and Markets of this State so that it might make deliveries at wholesale in that county. In accordance with section 258-c of the Agriculture and Markets Law, governing the licensing of milk dealers,[2] on July 15, 1975 a hearing was held, at which witnesses and exhibits were presented by petitioner and by the Department of Agriculture and Markets, directed to the questions "whether the issuance of the license extension will tend to a destructive competition in a market already adequately served, or the issuance is in the public interest; and whether the applicant is qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business".

2. Section 258-c of the Agriculture and Markets Law, insofar as relevant, provides: "No license shall be denied to a person not now engaged in business as a milk dealer, or for the continuation of a now existing business, and no license shall be denied to authorize the extension of an existing business by the operation of an additional plant or other new additional facility, unless the commissioner finds by a preponderance of the evidence, after due notice and opportunity of hearing to the applicant or licensee, one or more of the following: (1) that the applicant is not qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business * * * (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest."

The department presented nine witnesses, one of whom was a statistician who introduced and explained figures produced by a milk market survey of Richmond County conducted in the year prior to the hearing; the remaining witnesses were officers or employees of milk distributors already licensed to serve and which were serving Richmond County, who testified in detail as to the nature and extent of business each was doing there and as to the competition existing and its consequences, as well as the consequences of the entry of a new distributor into the area. Petitioner offered no testimony on these subjects and produced only three witnesses: an employee of its customer Pathmark, who testified concerning the request made to petitioner to begin distribution in Richmond County; petitioner's accountant, who attested to the firm's financial reports; and petitioner's chairman of its board, who described its operations, licenses and equipment. At the close of the hearing petitioner requested and was granted the right to call additional witnesses at a later session of the hearing; however, petitioner subsequently advised that no further witnesses would be called and the hearing was not resumed. Thereafter respondent commissioner, with the consent of petitioner, acting without a report by the hearing officer (who had transferred from the department) but on the basis of the transcript and exhibits, made a determination denying the license application on finding that granting petitioner's application for an extension to serve at wholesale in Richmond County "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest". The commissioner further found that it could "not be concluded that applicant's request for extension of its milk dealer's license to Richmond County should be denied for reason of char-

acter or experience or financial responsibility or equipment properly to conduct the proposed business".

Petitioner has thus far sought without success to overturn the commissioner's denial of its application for an extension of license. On its present appeal it sets out two challenges: (1) that the commissioner's determination is not supported by a preponderance of the evidence before him as required by section 258-c of the Agriculture and Markets Law, and (2) that the commissioner's application of the statute to petitioner in this case violates the commerce clause of the United States Constitution.

Specifically, the commissioner concluded: "The entry of another substantial processor-distributor of milk to Richmond County with primary interest in serving larger-volume supermarket accounts would under existing circumstances, tend to a destructive competition for sales of milk. It is concluded that there would be considerable pressure exerted by the applicant to establish a foothold in the market. This, along with the likelihood of competitive reaction by established dealers, would have a price-depressing effect on the market with destructive impact upon medium-size and smaller-volume milk dealers. These dealers perform an important function. The public interest requires that a balanced milk distribution structure be maintained in the market, so that service on retail home delivery routes and service to small volume wholesale customers is readily available. This type of service entails much higher unit costs than service to high volume supermarket accounts. There is an inevitable tendency for the larger milk dealers to attempt to skim the profitable supermarket accounts and neglect service to smaller volume accounts. The applicant does not perform any retail home delivery services. The public interest in maintaining a

balanced milk distribution structure within Richmond County, adequate to serve all the needs of the market, would not be served by granting the application for extension."[3] The commissioner then determined "that granting the application of Tuscan Dairy Farms Inc. for extension of its milk dealer's license to serve at wholesale in Richmond County would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest".

We agree with the Appellate Division that this determination is supported by a preponderance of the evidence before the commissioner. Several of the milk distributors summoned by the department who variously serviced small stores, luncheonettes, fruit and vegetable stands and retail home customers, recited statistics which showed a decline in milk distribution business in the preceding two years. The distributor doing the largest volume of business in the area had closed its pasteurizing plant in Richmond County three months before the hearing due to a lack of sufficient volume to operate the plant efficiently. There was ample testimony of intense competition and price wars in the sale of milk in Richmond County and proof that each time a new distributor entered the area a price competition ensued as a result of the entrant's attempt to build a market for itself by undercutting existing prices followed by the responsive reduction in prices, first by the outlets being serviced by the newcomer, then by competitors of those outlets and their suppliers. A distributor serving "mostly little deli's and the mom and pop stores", also engaged in retail delivery of milk, testified that such price competition not only caused the mom and pop stores to suffer badly

3. A related conclusion by the commissioner that "the market is already adequately served" is not challenged by petitioner.

but that his own business suffered because he had to sell milk more cheaply in order to sell it at all, so that the sale of milk at the time when there was a price war caused by a new supplier was not profitable and "we are just trying to hold our heads above water". His statement that he was nevertheless going to continue in his business was apparently explained by his remark "I have been lucky. I have managed to pick up a couple of good stores." Additionally, there was testimony by the manager of the distributor that had recently entered the area and which served only small outlets that it was finding the competition "very tough" and had acquired fewer customers than it had anticipated when it had been licensed. He stated that retail home delivery business requires much more mileage on the distributor's trucks than does store business, which is a direct run.

As previously indicated, petitioner produced no evidence of its own as to the consequences which might be expected to follow the licensing of an additional distributor. It now attempts only to impeach the probative worth of the testimony of the department's witnesses, emphasizing their position as potential competitors of petitioner whose testimony should be subjected to particular scrutiny by reason of that circumstance.

As a public official with expertise in the area of marketing and distribution of dairy products, the commissioner found that the public interest requires the maintenance of a balanced distribution system, including availability of service to retail home delivery routes and small volume wholesale customers. The direct evidence, together with the inferences reasonably to be drawn therefrom, supports the conclusion that introduction in Richmond County of a new distributor of milk to supermarkets only—with adverse

effect on distributors presently serving small retailers and themselves engaged in retail sales—would tend to a competition for milk sales which would be destructive by reason of the potential disturbance of the balanced distribution structure. The licensing of petitioner to enable it to serve its customer Pathmark, a supermarket chain, would do nothing to counteract this disturbance, inasmuch as it was the maintenance of distribution to small outlets and retail sellers that would be jeopardized, and no proof was offered that petitioner would serve those outlets and sellers. Such proof as there was, was to the contrary. Thus, to the extent that petitioner challenges the commissioner's observation and reliance on the fact that petitioner does not itself render any retail home-delivery services, it is notable that this fact was testified to by one of petitioner's own witnesses and that petitioner offered no proof whatsoever that it desired or intended to service other than supermarkets in Richmond County. In its brief petitioner even now stresses that its application was limited to sales "at wholesale".

On the basis of the evidence introduced by the department, taken with the petitioner's failure to offer any countervailing evidence, we reject petitioner's argument that the commissioner's determination was not supported by the preponderance of the evidence before him.

Turning then to petitioner's claim that the commissioner's determination violates the commerce clause of the Federal Constitution, we look to the decisions and opinions of the Supreme Court of the United States. We find no decision of that court which is squarely dispositive. The cases which have upheld State regulation of commerce in milk and dairy products against challenges under the commerce clause have presented predominantly issues of local

price regulation, and are thus distinguishable from the present case. In *Highland Farms Dairy* v. *Agnew* (300 US 608) the licensing requirement of a Virginia milk control statute and the milk prices fixed by the commissioner created under the statute were found by provisions of the law itself and by the commissioner's application thereof to be inapplicable to a challenging interstate milk distributor. In *Milk Bd. v. Eisenberg Co.* (306 US 346) it was held that Pennsylvania's statutory economic regulation of its local milk industry, including the licensing and bonding of milk dealers and the establishment of prices paid to producers, could constitutionally be applied to milk dealers engaged exclusively in interstate commerce. In *State v. Pure Vac Dairy Prods. Corp.* (251 Miss 457, app dsmd for want of a *Federal question sub nom. Pure-Vac Dairy Prods. Corp. v. Mississippi ex rel. Patterson*, 382 US 14) the application of a Mississippi milk price control statute to a Tennessee producer shipping milk into Mississippi for sale there was approved. In *United Dairy Farmers v. Milk Control Comm.* (404 US 930) the Pennsylvania milk control law was again upheld, this time against claims that it deterred out-of-State producers from shipping milk into Pennsylvania. Similarly, from the opposite view, none of the cases discussed below, in which State regulation of the milk industry has been struck down, has presented a factual context or regulation of a sort comparable to that in the present case.

Petitioner does not dispute that the milk industry within the State is a proper subject for regulation under the State's police power (e.g., *Nebbia v New York*, 291 US 502). It contends, however, that, when the purpose of the exercise of the State's authority is economic regulation, any obstruction of interstate commerce—whether direct or indirect, substantial or incidental—is invalid under the commerce

clause. As a consequence, it urges that the Appellate Division erred when petitioner contends, it applied a balancing of interests test—weighing the effect on interstate commerce against local benefit—and upheld the commissioner's denial of the opportunity to petitioner to distribute milk at wholesale in Richmond County.[4]

There is unquestioned authority, on which petitioner relies, for the proposition that legislation enacted solely for the protection of local economic interests by the restriction of competition from without the State is inherently unconstitutional. Thus, in *Baldwin* v. *G. A. F. Seelig* (294 US 511) the Supreme Court held invalid a New York regulation which prohibited the sale of milk imported from other States, there Vermont, unless the purchase price paid to the out-of-State farmer was at least equal to that paid to New York farmers. The regulation, which the Supreme Court in a subsequent case described as "an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state" (*Milk Bd.* v. *Eisenberg Co.*, 306 US 346, 353, *supra*), was denounced as a tariff barrier hostile to the national economic solidarity.

"The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New*

4. No contention is advanced by petitioner that the protection the commissioner seeks to accord the milk distribution system in Richmond County could have been promoted by any alternative means having a lesser impact on interstate activities.

York, supra. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *(Baldwin* v. *G. A. F. Seelig,* 294 US 511, 522-523, *supra.)*

Fourteen years later *Hood & Sons v Du Mond* (336 US 525) involved the denial under section 258-c of the Agriculture and Markets Law of a license sought by a Massachusetts corporation for construction in New York of a milk receiving depot at which raw milk would [sic] collected for shipment to Boston. Invalidating the denial of license the Supreme Court found that it had been "for *the avowed purpose* and with the practical effect of curtailing the volume of interstate commerce to *aid local economic interests*" (336 US, pp 530-531; emphasis added).

Similarly in *A & P Tea Co. v Cottrell* (424 US 366) the court struck down the denial of a Louisiana milk producer's permit to distribute in Mississippi milk products from Louisiana, which denial was predicated on the absence of a reciprocity agreement with respect to sales of milk between the States of Louisiana and Mississippi, action prompted by an evident concern for the economic welfare of milk dealers in the regulating State. Applying a balance of interests test, the court found unconstitutional the total prohibition of entry of foreign milk used as a weapon to force a sister State into a reciprocity agreement.

Each of the cases discussed, as well as others also relied on by petitioner, involved State action that was found to have had as its avowed purpose the exclusion of competition from out of State for the protection of the economic well-being of the milk industry within the State. Additionally, in the *Baldwin* and *A & P Tea Co.* cases the challenged action sought to affect, and, thus in a degree significantly to control, the commerce in milk in a State other than the regulating State. In *Baldwin,* it was New York's intention to affect commerce in milk in Vermont; in *A & P Tea Co.* it was Louisiana's intention to affect commerce in milk in Mississippi.

Quite a different situation is presented by the case now before us. Of cardinal and distinguishing significance, which petitioner would have us overlook, is the fact that the commissioner's denial of the license sought by petitioner did not have as its objective the economic protection of the milk industry of New York State, or even that of the County of Richmond. The commissioner's concern in this instance was addressed rather to the maintenance of the existing "balanced milk distribution struc-

ture", and particularly that portion of the present distribution system which provides "service on retail home delivery routes and service to small volume wholesale customers," the small outlets and the mom and pop stores, which individually and collectively serve consumer needs not met by supermarkets and warehouse-type outlets. "The public interest requires that a balanced milk distribution structure be maintained in the market, so that service on retail home delivery routes and service to small volume wholesale customers is readily available." Because petitioner's interest is in distribution only through supermarkets and wholesale outlets, its entry into Richmond County would not contribute to the maintenance of such a balanced distribution system or provide services equivalent to those now available to the consumers. Thus, the denial of license here is not for the benefit of the dealers and distributors presently serving the market, but for the protection of the welfare of the customers, in the public interest. Although it may be assumed that the denial of a license to a new supplier seeking to break into the market area will incidentally provide a measure of economic protection to businesses already operating within the existing system (whether engaged in interstate or intrastate commerce), this intermediate consequence should not serve to abrogate the ultimate, legitimate objective of preserving a distribution system necessary to serve the varied needs of milk consumers in Richmond County, when economic protection of the local industry was not the purpose which the denial sought to accomplish.

The possibility of incidental economic benefit to the present milk industry should not be fatal to the validity of State regulation for consumer protection particularly when, as here, the determination implementing the objective was not dependent on the fact that petitioner's product, if permitted, would be shipped from an out-of-State source. Thus—and closely related to the absence of a motive to protect local industry—the denial of petitioner's application was not in pursuit of an exclusion of or discrimination against competition originating without the State (cf. *City of Philadelphia v. New Jersey*—US—, 46 USLW 4801). So far as appears, petitioner's status as a New Jersey corporation proposing to ship milk from outside the State into the metropolitan New York area was in no way a factor on which the challenged determination was grounded. No prohibition of goods traveling across State borders was sought to be accomplished; the restriction was only against the particular method of distribution of milk in Richmond County, whether the milk came from within or without the State. Nothing suggests that the negative response petitioner's application received would have been any different had the applicant been a New York wholesaler seeking to distribute milk produced and processed within New York. The fact that the denial of the application resulted in exclusion from the Richmond County market of milk which would have been shipped in interstate commerce was only a happenstance occasioned by the identity of this applicant; it was not the *raison d'etre* of the commissioner's action. There was testimony that at least one supplier presently operating in Richmond County is, like petitioner, based in New Jersey. Petitioner itself is licensed and conducts extensive business in New York, engaged as it is in wholesale distribution of milk or milk products in most of the counties of the State. (Cf. *Exxon Corp. v. Governor of Md.*, —US—,—, 46 USLW 4662, 4665.)

Section 258-c of the Agriculture and Markets Law on its face does not discriminate with respect to the activities of

intrastate and out-of-State suppliers as tending to a destructive competition in a market already adequately served, on the basis of which licensing may be withheld. No reference is made in the statute to the source of the competition, whether from within the State or without. That the absence of such a distinction is a significant factor in viewing applications of the statute adverse to an out-of-State dealer, see *Panhandle Co. v Michigan Comm.* (341 US 329, 337). Moreover, and equally significant, nothing in the record indicates that the commissioner's application of the statute in this instance or in general has been other than evenhanded in treatment of interstate and intrastate commerce alike.

Finally there is no suggestion—and could be none—that the statute or its application to petitioner represents any attempt at extraterritorial control of trade or commerce. Unlike *Baldwin* (294 US 511, *supra*) and *A & P Tea Co.* (424 US 366, *supra*) there is here no aspiration to affect or regulate the milk industry outside the boundaries of New York. In *Baldwin* the intention and consequence of the New York regulation was to maintain the level of prices paid for milk in Vermont. In *A & P Tea Co.* the intention and consequence of Louisiana's regulation was to open the markets of Mississippi to Louisiana milk. Unlike *Hood,* in which the result of New York regulation would have been to interfere with the supply of milk to Boston, there is here no demonstrated impact on a milk market outside the borders of New York State. In the present instance, neither by intention nor by consequence, by exclusionary requirement or by enticement, is there any demonstrated influence on the sale of milk in New Jersey or in any other State. The denial of distributor's license under section 258-c focuses entirely on the community sought to be served

by the applicant and on the protection of the present balanced milk distribution structure for consumer benefit.

We recognize that the denial of this New Jersey petitioner's application to distribute milk on a wholesale basis in Richmond County has some incidental effect on interstate commerce. Balancing this incidental impact against the interest of the State of New York in protecting milk consumers in Richmond County, however, we conclude that where the purpose and goal of the restriction employed is consumer protection and not the economic well-being of the present milk industry, and the means chosen does not involve an attempt to control commerce in another State or otherwise to produce an extraterritorial effect and does not operate to discriminate against or place an embargo on interstate commerce, the obvious local interest at stake outweighs whatever national interest there might be in the prevention of the State restrictions *(Cities Serv. Co. v Peerless Co.,* 340 US 179, 186-187). In the analysis most recently articulated by the Supreme Court in *A & P Tea Co. v Cottrell* (424 US 366, 371-372, *supra),* if a court finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, it is confronted with a problem of balance. The general rule which then becomes applicable can be phrased as follows (424 US, pp 371-372): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. * * * If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved,

and on whether it could be promoted as well with a lesser impact on interstate activities." (Cf. *City of Philadephia v New Jersey,* — US —, 46 USLW 4801, *supra.)* We conclude that the denial of petitioner's application for an extended license in the present instance passes this test.

One further word should be written with respect to *Hood & Sons v. Du Mond* (336 US 525, *supra*), a case heavily relied on by petitioner. Examination of the record in that case, and particularly the findings of fact and conclusion of the then Commissioner of Agriculture and Markets, reveals that the concern there was wholly with protection for local milk dealers; there was no aspect of attention to consumer protection, the motivating objective in the present case. The testimony before the commissioner was as to possible shortages of milk supply to the local dealers rather than to consumers. The commissioner concluded that the three milk plants near the site of Hood's proposed new plant had "the capacity to handle more milk than they are now handling", and "that one of the factors affecting the economy of operating county milk plants, is the volume of milk handled, * * * 'In each case the volume of milk received at the individual plants was by far the most important factor affecting the cost per 100 pounds.'" The summary conclusion was

"If applicant is permitted to equip and operate another milk plant in this territory, and to take on producers now delivering to plants other than those which it operates, it will tend to reduce the volume of milk received at the plants which lose those producers, and will tend to increase the cost of handling milk in those plants.

"If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to

deprive such markets of a supply needed during the short season."

Thus, the focus of the commissioner's attention was exclusively on the adverse impact which the erection of a new plant in the area would have on the existing milk *plants. Baldwin* had previously established that economic disadvantage generally to the milk industry could not be accepted as justification for burdening interstate commerce, even though it could be argued that "the maintenance of a regular and adequate supply of pure and wholesome milk" (294 US, p 523, *supra*) might thereby be put in jeopardy. Thus, economic protection of milk dealers, the objective of the denial of the license in *Hood,* would not support the State regulation.

One looks in vain in *Hood* for any translation of economic disadvantage to dealers into injury to customers The commissioner's determination does not mention consumers; the opinions in our court (297 NY 209) and in the Supreme Court (336 US 525) do not mention or address the subject of consequences to consumers or consumer protection. Thus, it is entirely understandable that the Supreme Court there concluded that the restriction was (p. 530) "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests." It is determinative that in the present case, the objective of the commissioner's action was the maintenance of a balanced milk distribution structure for the protection of the consumer-public, not the erection of parochial barriers to safeguard the economic well-being of local dealers. Additionally, in *Hood* the denial of the desired license would have had the inevitable extraterritorial effect of interfering with the distribution of milk in the Boston area, a factor of out-of-State impact

for which there has been no demonstrated counterpart in the present case.

For the reasons stated, the judgment of the Appellate Division should be affirmed, with costs.

JASEN, J. (dissenting). I cannot agree with the majority's conclusion that the commissioner's denial of a license to permit appellant to serve wholesale milk dealers in Richmond County did not offend the commerce clause of the United States Constitution. (Art. I, § 8, subd 3.)

No one will deny the authority of each State to regulate, pursuant to its police power, intrastate business for the protection of its citizens' health, safety, morals and general welfare, notwithstanding that such regulation effects an incidental burden upon interstate commerce. (*Baldwin v G. A. F. Seelig,* 294 US 511, 512.) Provided a State statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental", the Supreme Court has recently observed, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (*A & P Tea Co. v Cottrell,* 424 US 366, 371-372, quoting *Pike v Bruce Church, Inc.,* 397 US 137, 142.)

Clearly, however, before the balancing approach advocated by the court in *A & P Tea Co.* may be employed to determine the constitutionality of a State statute affecting interstate commerce, there must be a showing that the challenged statute effectuates a "legitimate local public interest". While, as the majority correctly notes, the milk industry is an appropriate subject for regulation under the police power of the State (*Nebbia v New York,* 291 US 502), distinction has long been made between State legislation designed to foster public health and safety, and legislation intended to insulate local inhabitants from

unfavorable economic competition attributable to interstate commerce. (E.g., *Hood & Sons v Du Mond,* 336 US 525; *Milk Bd. v Eisenberg Co.,* 306 US 346; *Baldwin v G.A.F. Seelig,* 294 US 511, *supra.*)

In this regard, the Supreme Court has on a previous occasion, in *Hood & Sons v Du Mond (supra),* held unconstitutional, as applied, the very same statutory provision at issue today. In so doing, the court made clear that a State may not enact legislation burdening interstate commerce under the guise of a health measure for the true purpose of suppressing competition. (336 US, at p 538, *supra.*) Yet, the majority seeks to distinguish this case upon the theory that the constitutional infirmity in *Hood* stemmed from the fact that the commissioner premised his license denial upon a finding that operation of an additional milk receiving plant at the requested location would occasion the reception of a lower volume of milk by existing area plants, resulting in a decrease in operational efficiency—an economic, rather than health-related, interest. In marked contrast, maintains the majority, stands the present case, in which the commissioner premised his license denial not upon fear of the possibly debilitating effect competition might work upon the milk industry, but upon concern for the consumer. This concern for the consumer is alleged to have been brought about by the nature of appellant's business—the distribution of milk exclusively to supermarkets and wholesale outlets—which, in the commissioner's judgment, would not contribute to a balanced milk distribution system. For this reason, the majority concludes that the commissioner's decision was "not for the benefit of the dealers and distributors presently serving the market, but for the protection of the welfare of the consumers, in the public interest" (p 226).

I do not find this distinction persuasive. At the root of the commissioner's rationale lies the basic fear that appellant's entrance into the Richmond County milk market might, through competition, jeopardize the continued existence of milk distributors who service small volume wholesale customers, as well as making retail home deliveries necessary for consumer distribution. In my opinion, this reasoning constitutes nothing more than a subtle variant of the bootstrap argument that regulation of competition—an impermissible local interest—will in itself contribute to health—a permissible local interest. Needless to say, the Supreme Court has consistently rejected this argument. (See, e.g., *Hood & Sons v Du Mond*, 336 US 525, 538, *supra; Baldwin v G.A.F. Seelig*, 294 US 511, 522-523, *supra; Buck v Kuykendall*, 267 US 307, 315-316.) Particularly appropriate is *Baldwin v G.A.F. Seelig (supra*, at pp 522-523), from which the majority quotes the following (at p 224): "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia v. New York, supra.* Price security, we are told, is only a special form of santiary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception."

In my opinion, this admonition is equally applicable to the present case. To hold section 258-c of the Agriculture and Markets Law constitutional, as applied would be to burden interstate commerce to effectuate a primarily economic objective under the guise of a health measure. For this reason, I would reverse the judgment of the Appellate Division and declare section 258-c of the Agriculture and Markets Law unconstitutional, as applied.

Chief Judge Breitel and Judges Gabrielli, Wachtler, Fuchsberg and Cooke concur with Judge Jones; Judge Jasen disssents and votes to reverse in a separate opinion.

Judgment affirmed.

Opinion and Judgment Appealed From

COURT OF APPEALS
STATE OF NEW YORK

The HON. CHARLES D. BREITEL, *Chief Judge, Presiding*

No. 331

In the Matter of
TUSCAN DAIRY FARMS, INC.,
Appellant,

vs.

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,
Respondent.

The appellant in the above entitled appeal appeared by Shea Gould Climenko & Casey; the respondent appeared by Thomas G. Conway.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs. Opinion by Jones, J. All concur except Jasen, J., who dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA

Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 11, 1978.

Opinion and Judgment Appealed From

STATE OF NEW YORK
COUNTY OF ALBANY CLERK'S OFFICE } ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do HEREBY CERTIFY that I have compared the annexed copy Remittitur with the original thereof filed in this office on the 14 day of July 1978 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 6 day of Oct 1978.

GUY D. PAQUIN

Clerk

[SEAL]

APPENDIX B

Opinion and Order of Appellate Division, Third Department

In the Matter of TUSCAN DAIRY FARMS, INC., Petitioner, v J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York, Respondent.

Third Department, August 4, 1977

SWEENEY, J. P. The facts are not in dispute. Petitioner, a New Jersey corporation, has possessed a New York State milk dealers' license for some 20 years. It sells and delivers milk in several States, including New York. On May 28, 1975 it filed an application for extension of its New York license to sell at wholesale in several additional counties, including Richmond. After a hearing respondent denied the application pursuant to section 258-c of the Agriculture and Markets Law concluding that an extension of petitioner's license to include Richmond County would tend to a destructive competition of milk sales in a market already adequately served and as such would not be in the public interest. Such determination precipitated the instant article 78 proceeding.

Basically, petitioner urges two grounds for annulment. It contends the denial contravenes the commerce clause of the United States Constitution and that the record does not support respondent's determination.

We will consider the latter contention first. Unlike our review in most administrative proceedings, we are not here limited to a determination of whether there is substantial evidence to sustain the determination (*Matter of Echelman v Du Mond*, 283 App Div 276). Rather, we must determine whether respondent's determination is supported by a preponderance of the evidence. While a large part of respondent's proof consisted of testimony of milk

dealers already operating in Richmond County and it might be argued that they desired to prevent additional competition, we are of the view, considering the record in its entirety, that the determination is supported by a preponderance of the evidence (*Matter of Brucato v Wickham*, 28 AD2d 780). Consequently, we should not disturb it unless petitioner can prevail on the other issue raised.

The State has the authority, in the exercise of its police power, to regulate the milk industry (*Nebbia v New York*, 291 US 502). Our concern is whether such regulation impermissibly interferes with interstate commerce. While most regulations affecting the movement of goods interfere to some extent with interstate commerce not all run counter to the commerce clause. If the activity regulated is predominately local in nature and only indirectly or incidentally burdens interstate commerce, it is permissible (*Milk Bd. v Eisenberg Co.*, 306 US 346). A resolution of the nature of the activity is often determined by a balancing of interests (*California v Zook*, 336 US 725, 728). Another test was expressed in *Pike v Bruce Church, Inc.* (397 US 137, 142) as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." A reading of the statute in question demonstrates to us that its regulation of the milk industry is evenhanded. It makes no distinction between domestic and foreign applicants or between domestic and foreign products.

An analysis of the statute as applied to the present undisputed facts in light of well-established principles of

law, compels us to conclude that there is no violation of the commerce clause. One of the purposes of the instant statute is to prevent destructive competition which is a permissible exercise of the police power (*Nebbia v New York*, 291 US 502, *supra*) and, in our opinion, serves a legitimate local public interest. The record demonstrates that petitioner has not been prohibited from selling milk products in New York State, and has, in fact, been so engaged for some 20 years. Nor is there a general restriction prohibiting petitioner from the distribution of milk products brought into the State from without. Petitioner may sell and distribute milk supplies brought in from New Jersey in any of the counties of New York State where it has a license. In our view, the effect on interstate commerce is incidental and the burden imposed on such commerce is not excessive in relation to the derivative local benefits. Consequently, we find that the application of the statute in question in the present case does not violate the commerce clause of the United States Constitution. Additionally, we conclude that application of the balancing of interests test produces the same result. .

Petitioner's reliance on *Baldwin v G. A. F. Seelig, Inc.* (294 US 511) and *Hood & Sons v Du Mond* (336 US 525) is misplaced. In *Baldwin* the statute in question attempted to fix the price of milk in Vermont. Such action imposed a direct burden on interstate commerce and was impermissible. The determination considered in *Hood* clearly discriminated against the foreign market in favor of the local one. Such discrimination was also impermissible. Neither circumstance prevails in the instant case.

The determination should be confirmed, and the petition dismissed, without costs.

KANE, MAIN, LARKIN and HERLIHY, JJ., concur.

Determination confirmed, and petition dismissed, without costs.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 16th day of May, 1977.

PRESENT:

HON. MICHAEL E. SWEENEY,
Justice Presiding,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. JOHN L. LARKIN,
HON. J. CLARENCE HERLIHY,
Associate Justices.

TUSCAN DAIRY FARMS, INC.,
Petitioner,

For judgment pursuant to the provisions of Article 78 of the Civil Practice Law and Rules,

against

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,
Respondent.

Index No. 5803-76

The petitioner, Tuscan Dairy Farms, Inc. having commenced a proceeding pursuant to Article 78 of the Civil Practice Law and Rules for a judgment annuling a determination, dated May 3, 1976, of the respondent, J. Roger Barber as Commissioner of Agriculture and Markets of the State of New York, and said proceeding having been transferred for disposition to the Appellate Division of the Supreme Court, Third Department, by an Order of the

Opinion and Order of the Appellate Division, Third Department

Supreme Court, Special Term at Albany, entered on the 28th day of September, 1976 in the Office of the Clerk of the County of Albany and said proceeding having been presented during the above-stated term of this Court, and having been argued by Shea, Gould, Climenko & Casey (Milton S. Gould, Esq., of Counsel) for petitioner, and by Thomas G. Conway, Esq., counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 4th day of August, 1977, it is hereby

ORDERED that the determination of the respondent be and hereby is confirmed and the petition dismissed, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: August 18, 1977.

APPENDIX C

Determination of Department of Agriculture and Markets

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF DAIRY INDUSTRY SERVICES

In the matter of the Application of TUSCAN DAIRY FARMS, INC., 750 Union Avenue, Union, New Jersey 07083, for an Extension of its Milk Dealer's License No. 549 to permit it to serve wholesale customers in Richmond County

Memorandum, Findings of Fact, Conclusions and Determination

Memorandum

By application received at the Department on May 28, 1975, Tuscan Dairy Farms, Inc., hereinafter referred to as the applicant, applied for extension of its milk dealer's license to permit it to serve at wholesale in the counties of New York, Bronx, Kings, Richmond and Queens. Applicant holds a milk dealer's license issued by the Department.

On June 26, 1975, the Department issued a notice of hearing to the applicant, scheduling a hearing for July 15, 1975 at New York, New York to consider applicant's request for authorization to serve wholesale customers in Richmond County. Applicant agreed that other counties included in its request for an extension of its milk dealer's license would be considered at a later date. The hearing was called pursuant to Section 258-c of the Agriculture and Markets Law for the purpose of taking testimony and receiving evidence relating to the following:

> Whether the issuance of the license extension will tend to a destructive competition in a market already adequately served, or the issuance is in the public interest; and

Whether the applicant is qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business.

The hearing was held on July 15, 1976 as scheduled before Jonathan Tell, Hearing Officer. Julius Braun, Attorney, presented for the Department, and the applicant was represented by Shea, Gould, Climenko, Kramer and Casey, Attorneys, by Kevin McGrath, Esq. and Martin B. McNamara Esq. At the close of the hearing on July 15, the applicant requested and was granted the right to call additional witnesses at a resumed session of the hearing. On September 3, 1975, the applicant's attorney wrote to the Department and indicated that no further witness would be presented. Accordingly, no further hearing sessions were scheduled. The Hearing Officer who presided at the hearing on July 15, 1975, subsequently transferred to a different Department. On March 8, 1976, the applicant's attorney stipulated and agreed that a hearing officer's report need not be filed and agreed that the Commissioners may proceed to render a Determination upon the basis of the transcript of the hearing and exhibits.

Findings of Fact

1. The milk dealer's license of the applicant permits it to sell and deliver milk at wholesale in Rockland and Orange Counties, and to sell sterilized cream and half and half, aseptically packaged in containers not to exceed one quart size, to other licensed dealers in New York State except for the counties of Erie, Niagara, Monroe and Orleans. Applicant has on occasion during the past three years been

charged by the Department with violations of the Agriculture and Markets Law. The violations were not considered cause for revoking the company's milk dealer license.

2. Applicant operates a large, well equipped milk processing plant at Union, New Jersey, convenient to Richmond County, New York (Staten Island). It has substantial sales and distribution of milk to supermarkets, schools, institutions and other wholesale outlets in New Jersey and New York. The applicant operates no retail home delivery routes in New York or elsewhere. Applicant's entire business consists in selling milk to wholesale accounts. Applicant obtains approximately 52 percent of its raw milk supply from New York State sources but only about 10 percent of its milk sales are in such state. It segregates its milk supply for sales in New York State in order to meet the New York butterfat standard which is higher than New Jersey's standard.

3. Applicant holds licenses or health permits from various states in the eastern part of the country to transport, process, manufacture or distribute milk or other dairy products. It is listed in the July 1, 1975 issue of Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers published by the U.S. Department of Health, Education and Welfare.

4. Applicant demonstrates satisfactory financial responsibility through statements showing substantial net worth and profitable operations.

5. Applicant was contacted by a chain supermarket customer which it serves in New Jersey to supply milk to 4

of the chain's stores in Richmond County. The chain is now served in Richmond County by two milk dealers who have generally provided satisfactory quality and service. A representative of the chain stated that it contacted the applicant about delivering milk to Richmond County because of a temporary problem with leaky containers and short coded merchandise received from one of the dealers now supplying its milk in such county. This witness indicated that price is not an important factor in seeking a new supplier for Richmond County because prices charged for milk by the various vendors from whom the chain buys differ little. Dollar sales of dairy products to the 4 stores in Richmond County are approximately $18,000 per week.

6. There are 10 milk dealers with unlimited license authorization to sell and deliver milk at wholesale in Richmond County. There are 13 other milk dealers who have limited wholesale rights in the county. The 23 milk dealers include some with substantial sales and distribution of milk throughout the Metropolitan New York area.

7. Two milk dealers, Weissglass Gold Seal Dairy Corporation and Sealtest Foods (Krafteo Corporation), closed milk processing plants in Richmond County during the past two years. Weissglass continues to be a major distributor of milk in the county, now having its milk processed and packaged at another New York City plant. In March 1973, a large-volume processor-distributor of milk, Elmhurst Dairy, was granted an extension of license to serve wholesale customers in Richmond County.

8. The population of Richmond County in 1970 was 295,443, an increase of approximately one-third from the

1960 census. Richmond County is the least populated of the New York City boroughs.

9. Eight milk dealers licensed for Richmond County testified at the hearing at the request of the Department. At least five of these dealers serve the entire county. The dealers who testified account for a large proportion of milk sales in Richmond County.

10. Deltown Foods operates two wholesale milk routes serving Richmond County. It delivers milk to all types of wholesale customers in the county 6 days a week from its processing plant at Yonkers, NY. Deltown's sales of milk in Richmond County have been relatively constant over the past two years, but its total volume of business in the New York Metropolitan area has declined. Farmlea-Westchester Dairy Co., another licensee in Richmond County, is a subsidiary company of Deltown Foods.

11. Rhinestone and Ebstein operate one milk delivery route in Richmond County, serving retail and small-volume wholesale customers in one area of such county. This dealer concentrates sales in one area of Richmond County for economy reasons. Milk is purchased by Rhinestone and Ebstein from another local milk dealer. Price competition from supermarkets has caused this dealer's volume of milk sales at wholesale to decline by 50 percent from the level of two years ago. The dealer's retail sales of milk are also down.

12. Dairylea Cooperative operates two wholesale delivery routes in Richmond County which sell approximately 11,000 quarts of milk a day to various types of wholesale customers in the area. Most of such milk is processed at

Dairylea's Woodside plant in Queens County, NY which is now operating at about two-thirds of its capacity. Overall, Dairylea sales of milk in the Metropolitan New York area are about the same as a year ago. This dealer carries on an extensive sales and advertising program but finds that Richmond County is a highly competitive area with respect to prices for milk.

13. Richmond Farms delivers milk 6 days a week to all areas of Richmond County from three wholesale routes. It does not now serve any chain supermarkets. Richmond Farms obtains its milk and dairy by-products from two milk dealers licensed for the county. During the past year, this dealer lost about one-third of its volume of milk sales in Richmond County, primarily because of losing two major hospital bids. Richmond Farms has also had its volume of milk sales decreased because of price competition and new stores opening which drained sales from its store customers. This dealer testified that recurring situations of depressed pricing of milk are common to Richmond County.

14. South Shore Dairy operates one milk route in Richmond County which serves primarily wholesale customers. Two years ago, this dealer operated two milk routes but dropped one because of declining home delivery sales. South Shore purchases its milk and by-products from a local dairy. This dealer has experienced keen price competition for sales to wholesale customers in Richmond County, especially when a new dealer enters the market. This has been the case with the recent entry of Elmhurst Dairy to Richmond County. Small milk dealers such as South Shore are also affected by fruit

and vegetable stands which use milk as a loss leader or promotional item.

15. Weissglass Gold Seal Dairy Corporation is the largest volume distributor of milk in Richmond County. It operates 13 wholesale delivery routes and 7 combination routes serving all types of wholesale customers as well as home delivery customers throughout the county. Weissglass' wholesale customers include many of the public and private schools in the county. This dealer recently closed its processing plant in Richmond County because the volume of business became too low for economical operation. Weissglass' sales of milk in Richmond County have declined from a year ago in part due to the loss of sales to chain supermarkets. This dealer has been affected by pricing competition from Elmhurst Dairy even though its milk is now processed by a subsidiary of Elmhurst. Weissglass finds that such price competition is typical with the entrance of a new competitor and continues at least until such competitor establishes itself in the market. Another cause of competitive instability is loss leader sales of milk by fruit and vegetable stands.

16. Elmhurst Milk and Cream was granted a license extension to serve Richmond County at wholesale on March 6, 1975. Since that time, it has developed one route serving the county. Milk is processed for Elmhurst at a subsidiary plant in Queens County, New York. This plant also processes milk for other dealers who distribute in Richmond County. Elmhurst has concentrated on soliciting the smaller volume wholesale customers in the county but has found pricing competition to be difficult and has been unable to fill the route.

17. Queens Farms Dairy has two wholesale routes in Richmond County, delivering milk to food stores and nursing homes. Its routes, like those of other dealers in the market, operate 6 days a week. Queens Farms has increased its sales of milk modestly in Richmond County during the past two years, but finds the level of prices to be relatively unprofitable. It considers milk prices in the county to be low compared to other New York City markets. Queens Farms operates a large milk processing plant in Queens County, supplying milk throughout the Metropolitan New York area.

18. Richmond County and the applicant's processing plant are both within the area regulated by the New York-New Jersey Milk Marketing Order. This Order regulates milk prices at the farm level only. The processing and distribution of packaged milk to wholesale and retail customers is not regulated by the Order. The Order establishes minimum prices milk dealers (handlers) are required to pay dairy farmers and cooperatives for raw milk. Charges or prices dealers pay farmers for milk over and above the minimum prices set by the Marketing Order may vary depending upon the negotiated agreement between the dealer and his suppliers of raw milk.

Conclusions

There is a substantial number of milk dealers licensed to sell and deliver milk to wholesale customers in Richmond County and such dealers are providing adequate service to the market. Ten milk dealers licensed for Richmond County are authorized to sell and distribute milk to wholesale accounts throughout the county. A

number of such dealers are large-volume processors and distributors of milk who can and do compete for and serve chain supermarkets with milk in the New York Metropolitan Area. The processing plants of some such dealers are not operating at full capacity and at least one plant in the county was recently closed by a dealer because it was not operating at an economical level. One large-volume dealer was recently granted a license extension for Richmond County and has become an important factor in competing for wholesale milk customers in the market. Prices of milk charged by milk dealers to store customers in Richmond County and the prices at which such stores are retailing milk are competitive for the New York Metropolitan Area. It is clear that the market is already adequately served.

The entry of another substantial processor-distributor of milk to Richmond County with primary interest in serving larger-volume supermarket accounts would under existing circumstances, tend to a destructive competition for sales of milk. It is concluded that there would be considerable pressure exerted by the applicant to establish a foothold in the market. This, along with the likelihood of competitive reaction by established dealers, would have a price-depressing effect on the market with destructive impact upon medium-size and smaller-volume milk dealers. These dealers perform an important function. The public interest requires that a balanced milk distribution structure be maintained in the market, so that service on retail home delivery routes and service to small volume wholesale customers is readily available. This type of service entails much higher unit costs than service to high volume supermarket accounts. There is an inevitable tendency for the larger milk dealers to attempt to skim the profitable super-

market accounts and neglect service to smaller volume accounts. The applicant does not perform any retail home delivery services. The public interest in maintaining a balanced milk distribution structure within Richmond County, adequate to serve all the needs of the market, would not be served by granting the application for extension.

On the basis of the record, it can not be concluded that applicant's request for extension of its milk dealer's license to Richmond County should be denied for reason of character or experience on financial responsibility or equipment properly to conduct the proposed business.

Determination

Now, therefore, in view of the above findings of fact and conclusions wherein it is found that granting the application of Tuscan Dairy Farms Inc. for extension of its milk dealer's license to serve at wholesale in Richmond County would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest, it is ordered that the application of the same for extension of its milk dealer's license to permit it to serve wholesale customers in Richmond County should be and the same is hereby denied.

This order shall take effect immediately.

J. ROGER BARBER

J. Roger Barber
Commissioner of Agriculture and
Markets of the State of New York

Dated and Sealed at
Albany, New York this
3rd day of May, 1976

APPENDIX D

Notice Of Appeal

IN THE SUPREME COURT OF THE
STATE OF NEW YORK
ALBANY COUNTY

(Albany County Clerk's
Index No. 5803-76)

TUSCAN DAIRY FARMS, INC.

Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 6, 1978)

Notice is hereby given that Tuscan Dairy Farms, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, entered in this action on July 11, 1978, affirming the order of the Appellate Division, Third Department which confirmed the determination of the Commissioner of Agriculture and Markets of the State of New York and dismissed the petition of the appellant herein.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

SHEA GOULD CLIMENKO & CASEY

By s/ MICHAEL LESCH
Michael Lesch, Esq.
A Member of the Firm
Counsel for Appellant
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Notice Of Appeal

To:

County Clerk of Albany County
Courthouse
Albany, New York 12207

Thomas G. Conway, Esq.
Counsel to the Department of
Agriculture and Markets
Room 812—Building No. 8
State Campus
Albany, New York 12235

Notice Of Appeal

State of New York)
County of New York) ss.:

I, Dale C. Christensen, Jr., an attorney associated with the firm of Shea Gould Climenko & Casey, Attorneys of Record for Tuscan Dairy Farms, Inc., appellant herein, depose and say that on the 5th day of October, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Department of Agriculture and Markets of the State of New York, the appellee and the only other party herein, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the official despository maintained and exclusively controlled by the United States Government at the corner of Madison Avenue and East 42nd Street, New York, New York, 10017, addressed as follows to the Counsel of Record of the Appellee:

Counsel to the Department of Agriculture
and Markets
Room 812—Building No. 8—State Campus
Albany, New York 12235

Attention: Thomas G Conway, Esq.
Counsel

Dale C. Christensen, Jr.

Dale C. Christensen, Jr.

[Sworn to on October 5, 1978.]

APPENDIX E

Memorandum of Department of Agriculture and Markets

DIS-1021 3/1/76

Milk Dealer Licensing Policy and Procedures

I. INTRODUCTION

Processors and distributors of fluid milk have had to adjust to very substantial changes in conditions affecting the marketing of their products during the 1960's and early 1970's. This has brought about many structural changes in the industry in New York State affecting competition, the viability of firms in each size category, the utilization of milk produced on New York farms and service to the public.

The licensing policy stated herein recognizes the dynamic nature of the milk business and is directed towards maintaining an efficient, service-oriented dairy industry in the State. The primary thrust of the policy is to stabilize competitive factors in the local markets while providing for orderly adjustment to changes in the technology and economics of milk marketing.

Major structural changes affecting milk marketing during the past 15 years include the dramatic shift of sales to chain supermarkets; specialization of many processors to serving chain store accounts with private label milk; decline of home delivery; obsolescense of small processing plants; vertical integration by some processors into captive dairy or convenience stores; a declining number of full-service dealers; and burgeoning costs of operating milk delivery routes. Advances in technology as against a declining demand for fluid milk have resulted in excess capacity in the industry. This has occurred despite very significant closings of plants and attrition in the number of licensed milk distributors. Even so, there are instances where smaller-volume wholesale and institutional customers are unable to obtain adequate milk delivery service.

Memorandum of Department of Agriculture and Markets

Excess processing capacity in the dairy industry, relatively high fixed costs of operations, and a declining market for fluid milk have combined to put the chain store organizations in a position to exploit their very substantial buying power. They have used such power at times to exact unreasonably low prices and favorable terms of sale from processors. The resulting cost savings to the chain stores have not generally been passed on to consumers.

Against this background, the task of developing a progressive yet orderly policy of license grants and extensions is difficult. The impact of a particular type of license application can be markedly different in each area, depending upon competition, structure and characteristics of the market.

II. PURPOSE

Licensing policy in conjunction with other economic controls over the dairy industry in the State is intended to:

1. Promote effective competition in each market.
2. Prevent undue concentration of sales.
3. Prohibit the use of coercive buying power by certain purchasers of milk.
4. Encourage viable middle-level processor-distributors and smaller-volume distributors in each market.
5. Maximize utilization and sales of milk in fluid form.
6. Maintain a choice of market outlets for producers.
7. Provide adequate service to smaller-volume milk customers at reasonable prices.
8. Insure competitive pricing and service to institutional outlets.

Memorandum of Department of Agriculture and Markets

III. POLICY

1. *Coverage:*

(a) Any person who proposes to purchase, handle or sell milk in a manner which represents the customary function of a milk dealer shall be required to file an application for license or extension of license. The applicant for such license or extension shall refrain from engaging in the business or functions for which the application is made until the application has been processed and authorization granted by the Department. An application will not be considered where the applicant has proceeded to operate without being duly licensed.

(b) Each application for a milk dealer's license or for an extension of a milk dealer's license to sell and distribute milk shall be for a specific county or counties, or a specific geographic area within a county and set forth in said application or extension, whether the applicant desires to sell and distribute milk on wholesale, retail or combination routes and each license issued or extended shall be limited to not more than the county or counties, or the specific geographic area within a county, designated in the application and shall be limited to the method of distribution set forth in said application.

(c) A food store, although exempt from licensing when acting in its capacity as a retailer of milk to consumers, shall be required to file application for a milk dealer's license whenever it proposes to process, transport or handle milk in the manner of a milk dealer or to sell milk to other than retail customers.

(d) A milk dealer may sell or distribute milk only to customers and accounts (including other milk dealers) within those markets or areas where he is duly licensed. He is precluded from arranging for f.o.b. or dock sales or

Memorandum of Department of Agriculture and Markets

other means of serving potential customers in other markets or areas regardless of the arrangements or methods which may be devised for the sale and delivery of the milk.

(e) Specific license authorization must be obtained by a milk dealer to deliver milk to his own stores or affiliated stores in markets or areas for which he does not currently hold a license to sell or distribute milk.

(f) Any proposed construction of a milk processing plant in an area for which a person or dealer is not licensed shall require the filing of an application for license or extension of license.

(g) Any purchase, merger or transfer of a significant percentage of stock of an existing milk dealer requires the filing of an extension application.

2. *Procedure:*

(a) Each application for a milk dealer's license or extension of license (including purchase of an existing milk business or stock transfer) shall be reviewed and analyzed by the Division of Dairy Industry Services in accordance with the provisions of Section 258-c and other pertinent sections of the Agriculture and Markets Law.

(b) A milk dealer's license or extension thereof may be issued after review by the Division of Dairy Industry Services in the following instances:

(1) Purchase of a business (including stock transfer) in a county where the purchaser possesses the same or greater license authorization than that of the company being purchased. The transfer of stock shall qualify under this section when the shares of stock have been bequeathed under the terms of the will of the decedent shareholder to a specific person or persons, or when the transaction is a sale or gift,

either outright or by trust from a shareholder to a member of his immediate family, or when the shares of stock are inherited under the laws of intestacy.

(2) Lease of a retail delivery route by a licensed milk dealer to an individual routeman.

(3) Construction or relocation of a dairy plant by a licensed plant operator in a county for which he is already licensed to operate a plant.

(c) Except for the instances set forth in paragraph (b) above wherein a milk dealer's license or extension thereto may be issued after review by the Division of Dairy Industry Services, each milk dealer licensed for a county or counties or a specific geographic area within a county shall be notified in writing, by certified mail, of any pending application for a milk dealer's license or extension relating to such county, counties or area. Such notice shall clearly set forth the nature and scope of the pending application, the date and location of any hearing scheduled thereon and invite the submittal of written information and comments relating to the pending application. A reasonable period of time shall be established for milk dealers who may be affected by such application to submit information and comments.

(d) Except for the instances set forth in paragraph (b) above, no application for a milk dealer's license or extension thereto will be granted until considered at a public hearing if any milk dealer licensed for the county, counties or an area therein submits in writing within the period established pursuant to paragraph (c) above a substantive reason or objection (i.e., it would lead to destructive competition in an area adequately served; it is against the public interest or the license or extension should not be granted by reason of the applicant's character, experience or financial responsibility) to issuance of such license or extension.

If after inviting written information and comments pursuant to paragraph (c), it is found that an application should be granted without hearing, each milk dealer licensed for the county, counties or area therein shall be notified in writing of such fact at least 10 business days in advance of the issuance of the license or extension.

(e) Each milk dealer licensed for the county or counties or a specific geographic area within a county shall be given reasonable notice and opportunity to appear and present testimony relating to such application at the public hearing wherein the said application for a milk dealer's license or extension thereto shall be heard.

Each milk dealer who paritcipates in a hearing to consider an application for license or extension shall be notified in writing at least 10 business days in advance of the issuance of such license or extension if the Commissioner determines, based upon the record of the hearing, that the application should be granted.

IV. HEARING PROCEDURE AND NOTICE

1. Copies of the Notice of Hearing will be mailed by certified mail to all dealers licensed in the area affected by the application. The Notice will be mailed at least 30 days before the hearing date, except where the application is for a single county or more limited area, the notice shall be mailed 20 days before the hearing date.

2. The hearing date will be established after consultation by the Department with the applicant. The Department will attempt to accommodate the convenience of the applicant but must reserve the right to fix the date as orderly administration may require. A scheduled hearing will not be adjourned except upon demonstration by the applicant of extraordinary and unavoidable necessity. All reasonable effort will be made to hold the hearing in the county, or

in the case of multpile counties in one of the counties for which the license or extension is requested.

3. Ordinarily, dealers will not be subpoenaed. Those who do not testify at the hearing will be presumed to have no objection to the application.

4. Dealers who wish to apply for the privilege of limited participation in the hearing, as a non-party, may do so by filing in writing their intention to participate with the Legal Bureau at least five days prior to the hearing. The person executing such notice of intention must be authorized to sign a statement that their participation at the hearing will not confer any greater rights upon them than they possess as an interested party to review the Commissioner's determination. Their rights will not be expanded by reason of their participation. However, said statement will not waive any rights the dealer may possess as such interested party to review the Commissioner's Final Determination in granting or denying the competing dealer's application. Such application will be treated as public information.

5. The privilege of limited participation in the hearing will be granted to dealers who file such an application. Such participation will be limited solely to the issues set forth in Section 258-c of the Agriculture and Markets Law of the State of New York, namely:

(a) That the applicant is not qualified by character or experience or financial responsibility. With respect to this issue, however, the participation shall be limited to the submission of written proof. Oral proof shall be submitted to the Department of Agriculture in advance of the hearing for its investigation.

(b) That the issuance of the license or extension of a license will tend to a destructive competition in a market already adequately served.

(c) That the issuance of the license or extension of a license is not in the public interest.

With respect to those issues, the representatives of a competing dealer may:

With respect to item 5(a) above:

i. Submit written proof thereof.

With respect to items 5(b) and 5(c) above:

i. Question department employees called to testify.
ii. Cross-examine witnesses called by the applicant.
iii. Introduce evidence and produce witnesses to testify.

6. If it is necessary for the Hearing Officer to fix a date or dates for continuation of a hearing, the date will be fixed by the Hearing Officer after consideration of the applicant's and the Department Attorney's schedule only.

V. TIME SCHEDULE

1. Upon receipt of an application for license or extension, it shall be reviewed for completeness and accuracy within 10 days of the date of receipt at the Department. If incomplete, it shall be returned promptly to the applicant with a letter of explanation.

2. Upon completion, the application shall be referred for investigation and analysis by the Division of Dairy Industry Services in accordance with the procedure described above. A decision, in accordance with procedure described above, as to whether the application is to be granted or referred for hearing will be prepared within 30 days of its completion. The applicant will be duly notified of such decision.

Memorandum of Department of Agriculture and Markets

3. If it is determined that an application should be referred for hearing, all relevant economic and competitive data shall be gathered and the matter submitted for hearing. The time required to prepare the economic analysis will depend upon the availability of data and the scope of the license application. Timing of the hearing after the economic analysis is prepared and receipt of objections by licensed dealers, if any, will be at the direction of the Legal Bureau.

4. After receipt of the hearing record and Hearing Officer's memorandum, a determination on an application shall be prepared and submitted to the Legal Bureau within 30 days. The Department will strive to issue a determination within 90 days of the close of a hearing. This will provide for 30 days to transcribe the record and preparation of a Hearing Officer's memorandum; 30 days for Division review and preparation of a determination; and 30 days for Legal review and final consideration by the Commissioner.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

MOTION TO DISMISS APPEAL

THOMAS G. CONWAY,
Counsel to the Department
of Agriculture and Markets
of the State of New York
Building #8, Eighth Floor
State Campus
Albany, New York 12235
(518) 457-2775
Attorney for the Respondent-Appellee-Commissioner

JOAN A. KEHOE
of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
30 CENTER ST., BATAVIA, N. Y. 14020
(716) 344-2080, (716) 343-0457

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases:

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, the Appellee-Commissioner of Agriculture and Markets moves the Court to dismiss the appeal herein on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

I

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the validity of certain provisions of Section 258-c of the Agriculture and Markets Law of the State of New York dealing with the licensing of milk dealers (Chapter 126, Laws of New York, 1934, as amended).

This case deals with the sale of pasteurized, processed milk in consumer-size containers by a milk dealer to a chain of supermarket stores. The New York law creates a presumption in favor of the grant of a milk dealer's license, or an extension thereof. The statute prohibits the denial of a milk dealer's license, except where the Commissioner of Agriculture and Markets "finds by a preponderance of evidence, after due notice and opportunity of hearing to the applicant or licensee, one or more of the following: . . . (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest" (Subdivisions 2 and 3 of Agriculture and Markets Law § 258-c).

B. Statement

The appellant, Tuscan Dairy Farms, Inc. (hereinafter "Appellant" or "Tuscan"), which has been licensed to conduct business as a milk dealer in New York for approximately 20 years, filed an application on May 28, 1975, for an extension of its license authorization (A19, A34, 29a, 30a)*. Tuscan

* Numbers in parentheses preceded by "A" refer to pages of the Record on Appeal in the Court of Appeals. Numbers in parentheses followed by "a" refer to pages of the appendices contained in Appellant's jurisdictional statement.

sought to sell and distribute milk in consumer-size containers at wholesale in Richmond County with a primary interest in a chain of supermarkets (A34, A37).

On July 13, 1975, a hearing was held to consider Appellant's application, pursuant to Agriculture and Markets Law § 258-c (29a). The record included evidence that: service was available to all sizes and types of wholesale customers, and a full line of products were offered through existing dealers (A79, A86, A92, A99, A106, A115, A134, A137, A145); the largest-volume distributor in the county had closed its processing plant a few months previous to the hearing because volume was insufficient for efficient plant operation (A121); a large milk dealer licensed to serve Richmond County in March, 1975, had been able to develop but one route with only 23 customers (A134 and A138); the wholesale business for one dealer had declined 50 percent over the preceding two years due to price competition (A87); another dealer's business had declined one-third due to price competition (A99); one dealer's total volume had not increased over the preceding 1½ years, despite extensive advertising (A93-A94); and that present licensees had difficulty meeting prices of stores using milk as a loss-lender (A113, A151-A152, A123-A125). The Appellant produced no countervailing evidence in response to testimony by several witnesses familiar with the Richmond County market indicating the intense competition in that market (A74-A165).

Based on the record, the Appellee-Commissioner found that existing licensees were providing adequate service to the market (36a). The Commissioner also found that under the conditions then existing in Richmond County, the entry of the applicant, with a primary interest in serving large supermarket accounts, would tend to a destructive competition for sales of milk, resulting in a destructive impact on small and medium-volume dealers who serve small wholesale accounts

and make home deliveries (37a). The Commissioner further concluded that the public interest in having a balanced milk distribution structure to meet the milk needs of the county would not be served by extending Appellant's license (38a). The Commissioner denied the Appellant's application on the foregoing statutory grounds (38a).

C. Proceedings Below

The Appellant commenced a proceeding, pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York, to annul the Commissioner's Determination on the grounds that it was not supported by a preponderance of evidence and the Commissioner's application of § 258-c of the Agriculture and Markets Law was in violation of the Commerce Clause of the United States Constitution.

Appellant originally alleged that the Commissioner's Determination "was based in whole or part" on the fact that Appellant is not a New York resident, and for such reason Agriculture and Markets Law § 258-c is in violation of the Commerce Clause (A22-A23). Following extensive examination of records of the Department of Agriculture and Markets, *Appellant abandoned its claim that the denial of its application was based upon discrimination against a non-resident* (P. 4 of Appellant's Brief in the Court of Appeals).

The Appellate Division, Third Department, of the Supreme Court of the State of New York, by decision dated August 4, 1977, held that the Commissioner's Determination was supported by a preponderance of evidence, and that the Commissioner's application of Section 258-c of the Agriculture and Markets Law did not violate the Commerce Clause of the United States Constitution (24a-28a). Upon appeal to the New York State Court of Appeals, the judgment of the Appellate Division was affirmed (1a-22a).

II

Question Presented

Does the Commerce Clause of the United States Constitution preclude the State of New York from regulating the sale of processed milk in consumer-size containers by a New York licensee to a chain of New York supermarkets where the State has found that such sales would impair balanced service to the public?

III

ARGUMENT

The appeal herein fails to present a substantial federal question and therefore should be dismissed.

There is no substantial doubt as to the constitutional validity of the denial of an extension of a New York milk dealer's license to sell and distribute consumer size packaged milk in a county within New York, on the grounds that the granting of such an extension would tend to a destructive competition in a market already adequately served and would not be in the public interest. The opinion of the New York Court of Appeals, which confirmed the appellee-Commissioner's Determination denying Appellant an extension of its New York license upon such grounds, is fully consistent with the opinions of this Court.

The validity of a state's economic regulation of a local milk industry, including the licensing of milk dealers engaged exclusively in interstate commerce, has long been established by this Court. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). The Court recognized that, although Eisenberg was engaged exclusively in interstate commerce, its purchase of milk in Pennsylvania was essentially of a "local" nature and could be constitutionally regulated. 306 U.S. at

352. Similarly, the State of New York may validly regulate the essentially local activity of selling processed, packaged milk in New York although interstate commerce may be incidentally affected.

The Court's continuing approval of the state's power to regulate out-of-state milk dealers was demonstrated in *State v. Pure Vac Dairy Products Corp.*, 251 Miss. 457, 170 So. 2d 274 (Miss. 1964), app. dismissed for want of a substantial federal question, *Pure Vac Dairy Products Corp. v. Mississippi, ex rel. Patterson*, 382 U.S. 14 (1965). In *Pure Vac* it was recognized that the Mississippi milk price regulations concerned peculiarly local interests, and the application of these regulations to milk shipped by a Tennessee corporation to customers in Mississippi was upheld. 170 So. 2d at 278-279.

A state's economic regulation of the milk industry was again affirmed in *United Dairy Farmers Corp. v. Milk Control Comm.*, 335 F. Supp. 1008 (M.D. Penn. 1971), Aff'd. 404 U.S. 930 (1971), against claims that such regulation effected an impermissible burden on interstate commerce. 335 F. Supp. at 1014.

Contrary to Appellant's contentions (Juris. State. pp. 15-16), the case of *Schwegmann Bros. Giant Supermarkets v. Louisiana Milk Comm.*, 365 F. Supp. 1144 (M.D. Louisiana 1973), Aff'd. 416 U.S. 922 (1974), is further confirmation that a state may validly regulate the sale of milk even though the product originated outside the state, and interstate commerce is in some manner affected. As in *Eisenberg*, the Court held that regulation of the in-state aspect of a transaction did not constitute a burden on interstate commerce, even though the product originates outside the state where it is ultimately sold. 365 F. Supp. at 1156. It was only when Louisiana attempted to project its legislation outside its borders by controlling the price to be paid for milk in a sister state that its action was invalidated. *Id.* There has been no such extraterritorial purpose or effect in the matter now before the Court. The aim and effect of New York's action was regulation of the sale and distribution of consumer-size containers of milk within New York, a legitimate exercise of the State's police power, having a negligible, if any, effect upon interstate commerce.

In considering the most recent case before it dealing with state regulation of the milk distribution industry, this Court reaffirmed a state's broad power to legislate protection where local interests are concerned, even though interstate commerce may be affected in some manner. *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). When such local concerns overlap with the national interest, the court held that the rule enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1942), must be applied to determine whether an exercise of the state police powers violates the Commerce Clause:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." 424 U.S. at 371-72.

In *Cottrell*, a permit to distribute in Mississippi milk products processed in Louisiana was denied solely on the basis that there was no reciprocity agreement between the two states. 424 U.S. at 370. There, the state regulation was found to violate the Commerce Clause, but it is clear that such finding was based on the fact that the statute's purpose and result were to absolutely foreclose Louisiana from exporting its goods to Mississippi, unless it entered into a reciprocity agreement. 424 U.S. at 380. A state "may not use the threat of economic isolation as a weapon to force sister states to enter into even a desirable reciprocity agreement." 424 U.S. at 366.

The total exclusion of foreign products and the devastating effect on a sister state found in *Cottrell* is not present in the circumstance of the case now before the Court. The application by the Court of Appeals of the balancing test and its confirmation of the Commissioner's Determination under that test, is fully in accord with the opinions of this Court.

That the economic regulation of the New York dairy industry is a legitimate exercise of a state by its police power is not even open to controversy. See *Nebbia v. New York*, 291 U.S. 502 (1934) and *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 529 (1949). The Court of Appeals properly concluded that the challenged regulation, which helps to maintain a balanced, packaged milk distribution structure necessary to serve the milk needs of the consuming public, meets the *Pike* requirement that the regulation be for the effectuation of "a legitimate local public interest" (12a).

The evenhandedness of the statute, as well as its application herein, is also clear. That the statutory standards for determining whether a license should be denied are applied to interstate and out-of-state dealers alike is not even in question. In this regard, it should be noted that the appellant originally alleged that its license was denied based on its out-of-state residency (A22-A23). However, this claim was abandoned following an extensive examination of Department records by appellant's attorneys.* (Appellant's Court of Appeals' Brief,

* During 1976 and 1977, the appellant requested and was provided with voluminous material and information by the Department, including the names and places of business of out-of-state milk dealers licensed to sell consumer-sized packaged milk in New York; a list of foreign corporations' milk plants located in New York; a list of foreign corporations' milk plants located in New York; a list of counties in which out-of-state dealers are licensed and the terms of each such dealer's license, and the dates the licenses were issued; the names of all dealers whose licenses were denied or limited because they did not provide balanced service, and copies of the

(Footnote continued on following page)

p. 4.) Of course, appellant itself has been licensed as a milk dealer in New York for over 20 years (A19), and its volume of distribution in two New York counties is substantial (A37 and A250).

Finally, under the balancing test applied in *Cottrell*, New York's interest in preventing destructive competition and maintaining a balanced milk distribution system must be weighed against any effect on the flow of commerce.

The state's interest in preventing a tendency toward destructive competition is very great. Destructive competition among the processors and distributors of packaged fluid milk can drive efficient, medium-sized and smaller dealers out of business and soon reduce the number of distributors in a market to the point where effective competition is greatly impaired or eliminated. Destructive competition, while in process as well as in its final result, impairs the range of services and product available to small accounts. Independent grocery stores, small schools, hospitals, nursing homes, and home delivery customers lose available services in the competitive struggle between competitors to capture and hold high-volume, low-unit cost accounts. It is thus apparent, as properly concluded by the Court of Appeals, that a milk distribution structure to adequately meet the needs of the consuming public serves an important legitimate public interest.

The appellant's interest was in having its New York milk dealer's license further extended to authorize it to sell and

(Footnote continued from preceding page)

Determinations on such applications; a monthly summary of license actions taken since 1951; a list of all applications for milk dealer licenses or extensions filed between 1972 and 1975, and since 1960, with respect to the New York Metropolitan Area; copies of Determinations, Hearing Officer's Reports, and transcripts relating to applications; all statements of policy or interpretation prepared prior to 1976. Appellant also requested, and received, copies of approximately 600 pages of Department documents.

distribute packaged milk to chain stores in another county of New York. The denial of appellant's application for such additional license authorization, with a negligible, if any, effect on interstate commerce does not counterbalance New York's substantial interest in maintaining effective competition in milk sales and a balanced milk distribution structure.

The ". . . Commerce Clause was not written to let one particular dealer's interests destroy a state's orderly marketing system." *Hood, supra,* 336 U.S. at 559 (Black, J., dissenting). Although the effect upon one interstate dealer of the denial of its application might be to preclude its particular sales, this certainly does not amount to a prohibition of the sales of goods in interstate commerce as claimed by appellant (Jur. State. p. 10). Thus, in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission,* 341 U.S. 329 (1951), a case which upheld a state's regulation of the sale and distribution of gas to local customers by one engaged in interstate commerce, this Court declared:

> "Although the end result might be prohibition of particular direct sales, to require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition."

Of course, implicit in requiring an application for such certificate is recognition of the state's power to deny that application if it finds that the public interest will not be served.

The Court of Appeals correctly concluded that, in balancing these interests, the scales tip in favor of the State's interest which is at stake when compared to any minute effect on the flow of commerce that may occur by the denial of the license extension sought by appellant (15a).

Appellant's reliance upon *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), and *H.P. Hood & Sons v. Du Mond, supra,* to

support its position is ill-founded. The circumstances of this case do not involve the prohibition of milk sales in interstate commerce for the protection of local economic interests, despite such mischaracterization by appellant. Appellant's repeated claims of exclusion, discrimination, and protectionism were fully considered by the Court of Appeals, and properly found to be without merit (13a). Thus, the objectives or effects of the State actions invalidated in *Baldwin* and *Hood* are not present in the matter before the Court.

The provision declared invalid in *Baldwin* prohibited the sale of milk imported from neighboring states, unless the price paid to the out-of-state farmers was at least equal to that paid New York producers. In *Eisenberg, supra,* this Court characterized it decision in *Baldwin* by its statement that in that case the court:

> "condemned an enactment *aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state.* . .[T]he attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state" 306 U.S. at 353. (emphasis added)

The statute herein makes no discrimination between domestic and foreign applicants or between domestic and foreign products. Furthermore, unlike *Baldwin,* there is no attempt to affect or regulate in any way the market structure of a foreign market.

In the *Hood* case, a Massachusetts corporation applied for a license to construct in Greenwich, New York, a milk receiving depot for the shipment of raw milk to Boston, which was dependent upon milk imported from other states for 90 percent of its consumption. 336 U.S. at 526. Relying on Section 258-c of the Agriculture and Markets Law, the Commissioner of Agriculture and Markets denied the application because diversion of the raw milk supply might have had "a tendency to deprive such [local] markets of a supply needed during the

short season." 336 U.S. at 529. Thus, a statute neutral on its face was applied in a patently discriminatory manner designed to favor a local milk industry. This Court invalidated that determination which it found to be "for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests." 336 U.S. at 530.

In decisions subsequent to *Hood*, this Court has continued to explain *Hood* as a case involving discrimination against an out-of-state dealer. Thus, in upholding a state's power to fix prices on natural gas produced in its fields, although 90 percent of the production was transported out of state for consumption, the *Hood* decision was described as follows:

> "The vice of the regulation invalidated by *Hood* was solely that it denied facilities to a company in interstate commerce *on the articulated ground that such facilities would divert milk supplies needed by local customers; in other words, the regulation discriminated against interstate commerce." Cities Services Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 188 (1950). (emphasis added)

The Court again explained *Hood* as a case involving "an avowed purpose to discriminate against interstate goods" in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The ordinance before the Court excluded absolutely all milk that had not been produced within a radius of five miles of Madison. The appellant labels the Madison ordinance as an economic protectionist measure which did not discriminate against interstate commerce (Jur. State., pp. 17, 18). However, this Court, in fact, invalidated the regulation on the ground that it "plainly discriminate[d] against interstate commerce." 340 U.S. at 354. Furthermore, even though the ordinance discriminated against foreign milk, this Court, before invalidating the statute, still considered whether, and found that, "reasonable non-discriminatory alternatives

adequate to conserve the legitimate local interest [were] available." 340 U.S. at 354.

Although there was no such discriminatory intent or effect in the present case, the Court of Appeals still applied the final prong of the balancing test articulated in *Cottrell*, and considered whether the local interest "could be promoted as well with a lesser impact on interstate activities" (15a, 16a, citing *Cottrell, supra*, 424 U.S. at 372). The Court correctly concluded that the procedure used to promote the state's legitimate local interest passes this least-restrictive, alternative test (16a).

Again, in *Breard v. Alexandria*, 341 U.S. 622 (1951), the Court said:

> "Likewise in *Hood & Sons v. Du Mond*, it was the *discrimination against out-of-state dealers* that invalidated the order refusing a license to buy milk to an out-of-state distributor" 341 U.S. at 637. (emphasis added)

Referring to *Eisenberg*, the Court added:

> "Where no discrimination existed, in a somewhat similar situation, we upheld the state regulation as a permissible burden on commerce." *Id.*

In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, supra*, this Court characterized its decision in *Hood* as a case "where a state was said to have discriminated against interstate commerce by prohibiting it because it would subject local business to competition." 341 U.S. at 337. The Court also noted that the Michigan statute did "not distinguish between an interstate or intrastate agency desiring to operate in a locality." *Id.* In upholding the statute which prohibited Panhandle from selling natural gas which it transported by pipeline from Texas to industrial customers in Michigan without having a certificate of convenience and necessity, this Court stated:

> "[t]he sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution. In the absence of federal regulation, state regulation is required in the public interest. These principles apply to direct sales for industrial consumption as well as to sales for domestic and commercial uses." 341 U.S. at 333 (citations omitted)

It is readily apparent that the Court's holding in *Hood* was limited to a narrow basis and does not bar a state's regulation of local milk sales, although interstate commerce may be incidentally affected. Thus, although the Commissioner's Determination herein was issued pursuant to the same provision of law (amended) as the Determination in *Hood*, the cases are plainly distinguishable, as fully demonstrated in the decision of the Court of Appeals (10a-18a).

Appellant's reliance upon *City of Philadelphia v. New Jersey*, ... U.S. ...., 46 USLW 4801 (June 23, 1978), is also misplaced. In fact, the Court of Appeals' decision herein is fully in accord with this Court's holding in that recently-decided case. The statute declared invalid in *City of Philadelphia* prohibited the importation of most wastes originating in or collected outside New Jersey in an attempt to conserve the State's remaining landfill space. Thus, the New Jersey statute, on its face, was similar to the effects of the Determination in *Hood* in that it invidiously discriminated against those outside the State in order to protect local interests at the expense of sister states.

While state action which excludes or blocks commerce at its border to effect economic isolation and protectionism, as in *Hood*, *Baldwin*, and *City of Philadelphia*, may be invalid *per se*, the balancing test relied on in *Cottrell* is to be applied where, as here, regulation directed at legitimate local concerns is involved. 46 USLW at 4803. In this regard, it was not New Jersey's efforts to protect its citizens' environment or their pocketbooks which invalidated the statute in *City of Philadelphia*, but rather the statute's violation of the principle of non-discrimination in "block[ing] the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites." 46 USLW at 4804 and 4805. As properly concluded by the Court of Appeals, the determination made pursuant to the statute involved herein was not in pursuit of discrimination against or exclusion of competition from outside the state, nor was it for the protection of a local industry (13a).

IV

Conclusion

For the foregoing reasons, this appeal should be dismissed.

Dated: Albany, New York
November 6, 1978

Respectfully submitted,

THOMAS G. CONWAY,
Counsel to the Department of Agriculture and Markets of the State of New York,
Building No. 8, Eighth Floor,
State Campus,
Albany, New York 12235,
(518) 457-2775,
Attorney for the Respondent-Appellee-Commissioner.

JOAN A. KEHOE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

MICHAEL LESCH
Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Attorneys for Tuscan Dairy Farms, Inc., Appellant

Of Counsel
MILTON S. GOULD
MICHAEL LESCH
SANFORD A. BELL
DALE C. CHRISTENSEN, JR.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

Preliminary Statement

Appellant Tuscan Dairy Farms, Inc. submits this brief pursuant to Rule 16(4) of the Rules of the Supreme Court of the United States in opposition to the motion of appellee, the New York Commissioner of Agriculture and Markets ("Commissioner"), to dismiss this appeal.

Failing to address the substantial federal constitutional questions resulting from New York's absolute exclusion of New Jersey milk, the Commissioner's motion to dismiss in-

stead relies on four legal contentions which we show below are utterly without merit.[1]

1. The Wholesale Interstate Sales of Milk Excluded by the Commissioner are Not "Essentially Local" in Nature.

The Commissioner's principal contention appears to be that the activity prohibited in this case—the sale of milk at wholesale by a New Jersey milk processor to a New York retailer—is "essentially of a 'local' nature" (Mot., pp. 5-8) and thus does not fall within the ambit of the Commerce Clause. He relies primarily on *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939) (licensing, bonding, and price control); *State* v. *Pure Vac Dairy Products Corp.*, 251 Miss. 457, 170 So.2d 274 (1964), *appeal dismissed sub nom. Pure Vac Dairy Products Corp.* v. *Mississippi, ex rel. Patterson*, 382 U.S. 14 (1965) (price control); and *United Dairy Farmers Coop. Ass'n* v. *Milk Control Comm.*, 335 F.Supp. 1008 (M.D. Penn. 1971), *aff'd* 404 U.S. 930 (1971) (price control).

It is difficult to understand why the Commissioner urges this argument here, because it is one that the New York

1. Several "factual" statements made by the Commissioner are also incorrect. For example, the Commissioner suggests that the "range of services and product available to small accounts" has been impaired by "destructive competition (Mot., p. 9). Not only does this statement (made without record reference) have no support in the record but, to the contrary, the record shows a wide interest in and an active competition for these very institutional and other accounts (e.g. A80, A86, A92, A99-A101, A115, A146, A217, 31a). Similarly, the Commissioner suggests that appellant's entry might have an impact on the existing "balanced milk distribution structure" (Mot., p. 4). However, there is not the slightest indication in the record of what that impact might be, or that any milk dealer had been driven out of business or was in danger of being driven out of business or that any class of customers had been deprived of services in any way.

Court of Appeals expressly rejected below. Indeed, the Court of Appeals distinguished the very cases relied upon by respondent as follows:

> "The cases which have upheld State regulation of commerce in milk and dairy products against challenges under the commerce clause have presented predominantly issues of local price regulation [as opposed to outright prohibition], and are thus entirely distinguishable from the present case." (45 N.Y.2d at 222-223; 7a-8a).

In contrast, the present case involves neither local intrastate transactions nor mere price regulation. The proposed sales here—wholesale transactions from a New Jersey processor to a New York supermarket—would have their origin in one state and terminus in another. Moreover, the Commissioner's action does not merely "regulate" these interstate transactions, but prohibits them outright.

The Commissioner's reliance on *Schwegmann Bros. Giant Supermarkets* v. *Louisiana Milk Comm.*, 365 F.Supp. 1144 (M.D. La. 1973), *aff'd* 416 U.S. 922 (1974) and *A&P Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976) (Mot., pp. 6-8) is equally misplaced. In *Schwegmann*, the Court held that the Commerce Clause prevented the Louisiana Milk Commission from requiring Schwegmann, a Louisiana retailer, to pay Pure Vac, a Tennessee manufacturer of frozen desserts, the minimum prices fixed by the Commission. If the Commissioner in this case (as in *Schwegmann* and in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935)) had merely fixed the prices of sales from appellant to its customers in Richmond County, New York, that would have violated the Commerce Clause under *Schwegmann* and *Baldwin*. But here, the Commissioner went further and prohibited the sales outright, an even clearer violation of the Commerce Clause

under *Baldwin* v. *G.A.F. Seelig, supra; Buck* v. *Kuykendall,* 267 U. S. 307, 315-316 (1925); and *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U. S. 525 (1949).

Nor did *A&P Tea Co., Inc.* v. *Cottrell, supra,* "reaffirm . . . a state's broad power to legislate protection where local interests are concerned" (Mot., p. 7). On the contrary, the *Cottrell* case reaffirmed the constitutional prohibition against curtailment of sales of goods in interstate commerce. There, the Court found that a Mississippi regulation which precluded the sale of milk processed in Louisiana plants on a non-health related ground[2]—namely, that Louisiana had not signed a reciprocity agreement with Mississippi—was violative of the Commerce Clause.

Respondent apparently misconstrues the case to require an "absolute foreclosure" of all commerce in a particular product between two sister states. While that may have been the result in *Cottrell,* it is clear that *any* curtailment of interstate commerce may be prohibited if the objective or result is impermissible. As the Court noted (p. 375):

> "Only state interests of substantial importance can save [a regulation] in the face of that devastating effect upon the free flow of interstate milk."

And the court made it quite clear that obstruction of interstate commerce cannot be justified "as an economic measure", stating (p. 381):

> "The mandatory reciprocity provision of § 11, *insofar as justified by the State as an economic measure,* is 'precisely the kind of hindrance to the introduction of milk from other States . . . condemned as an "unreasonable clog upon the mobility of commerce . . . [It is] hostile in conception as well as burden-some in result."' Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S., at 377." (Emphasis added.)

2. The Court rejected Mississippi's contention that the clause served the state's interests in maintaining health standards (*See* 424 U.S. at 375).

In short, the effect of the statute in *Cottrell* is no different from the one at bar: both obstruct the flow of interstate commerce in the interest of economic protectionism and hence violate the Commerce Clause.

2. The Commissioner's Prohibition of Interstate Commerce Here On Economic Grounds Cannot be Justified by the Facial "Evenhandedness" of the Statute and the Lack of "Avowed Discriminatory Purpose."

The Commissioner next contends that his exclusionary action can be justified because of the facial "evenhandedness of the statute" (Mot., p. 8) and because "there was no . . . discriminatory intent or effect in the present case" (Mot., p. 13). In effect, the Commissioner asks this Court to impose a rule which places the enormous burden on interstate businessmen of proving "discriminatory" intent in order to overcome state exclusionary action with candidly economic ends. As demonstrated in our Jurisdictional Statement (pp. 16-19), this Court has *never* recognized the absence of "avowed" discrimination as a justification for exclusionary action for economic ends. While this Court has referred to "discrimination" in a Commerce Clause context, it has made clear that no discriminatory intent is required and that the exclusion of interstate commerce to protect or preserve local economic interests is *per se* "discriminatory." *See, Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354 at n. 4 (1951); *Toomer* v. *Witsell,* 334 U.S. 385, 403-406 (1948); *Pike* v. *Bruce Church, Inc.* 397 U.S. 137, 145 (1970).

The Commissioner's attempt to distinguish the *Dean* case as one involving state regulation which "plainly discrim-

inate[d] against interstate commerce" carefully omits the reasoning on which this Court relied in striking down the ordinance in *Dean* (Mot., p. 12). That ordinance forbade the sale of milk in Madison, Wisconsin as pasteurized unless bottled at a pasteurization plant within five miles of the center of the city. While the ordinance may have been "evenhanded" on its face in that it applied "equally" to in-state and out-of-state producers, this Court clearly recognized its "discriminatory" economic impact, stating (340 U.S. at 354):

> "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce."

Here as in *Dean,* the offending statute, while superficially "evenhanded," creates in its application and effect "an economic barrier protecting a major local industry against competition from without the State [which] plainly discriminates against interstate commerce" and should be struck down. Moreover in *Dean,* where the State invoked its "unquestioned powers to protect the health and safety of its people" (340 U.S. at 354), a balancing test was appropriate. Here, as we now show, where the purpose is only economic (to prevent a "destructive competition"), a balancing test is clearly inappropriate.

3. The Commerce Clause Does Not Permit A "Balancing Test" To Evaluate The Exclusionary Action Involved Here.

Next appellee urges that "a balancing test" should be applied to weigh the "effect" of the Commissioner's action "on the flow of commerce" (Mot., pp. 9-10). But we are aware of no case (and appellee has cited none) employing

a "balancing test" where a prohibition of interstate commerce for economic purposes was involved.

The Commissioner draws on *Pike* v. *Bruce Church, Inc., supra,* for the "rule" as to the balancing process (Mot., p. 7). There, the Court said (397 U.S. at 142):

> "Where the statute regulates even-handedly to effectuate *a legitimate local public interest, and its effects on interstate commerce are only incidental,* it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . ." (Emphasis added).

Neither of these two prerequisites to the use of a balancing test is present here. *First,* the Commissioner's action totally prohibiting (and not merely regulating) appellant's interstate sales in Richmond County has an exclusionary effect on interstate commerce. No case or rational definition has characterized a total exclusion of interstate commerce in a product as "only incidental." *Second,* the sole ground for the Commissioner's exclusion of appellant from the Richmond County market was that appellant's entry "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest" (38a). Nowhere, does the Commissioner demonstrate how this unabashedly protectionist rationale for his action "effectuate[s] a legitimate local public interest." Thus the second prerequisite for application of a balancing test under *Pike* is also entirely lacking.

What is, in the language of *Pike,* a "legitimate local public interest" is clarified in later portions of the opinion not quoted by respondent. The regulations at issue in *Pike* were Arizona's requirement that cantaloupes grown in Arizona be labelled and packaged in a certain manner in order to "promote and preserve the reputation of Arizona's

growers by prohibiting deceptive packaging"[3] (397 U.S. at 143). Such a regulation, of course, is not in the nature of a prohibition (such as was imposed here) and falls within the ambit of traditional "police power" objectives drawn in this Court's decisions in *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511 (1935) and *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949), which, in addition to health, safety and educational purposes, includes the prevention of fraud. The Court, however, found that this interest occupied a relatively low position in the hierarchy of state interests and could not justify the burdening of interstate commerce. The Court stated (397 U.S. at 143):

> "We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized,' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State."

The purpose of the statute here is the control of local competition—a purpose which has "always [been] held to be precluded by the Commerce Clause" (*Hood, supra,* 336 U.S. at 542). That State regulation of competition cannot be accepted as a ground for burdening interstate commerce lies at the core of the Commerce Clause and the concept of federalism. This point should have been laid to rest in *Hood* where this Court stated in the memorable words of Justice Jackson (336 U.S. at 537-538):

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig,* 294 U.S. 511, 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition."

3. The interstate packer-distributor in the case, Bruce Church, Inc., would have been forced to build an expensive packing plant in Arizona as a practical effect of the regulation, rather than utilize existing California facilities.

Nor is there any basis for the Commissioner's contention that *Cottrell* supports the application of a "balancing test" in this case (Mot., p. 13). In *Cottrell,* the Court noted that a balancing test comes into play when the "challenged exercise of local power serves to further a legitimate local interest" (424 U.S. at 371). There the state contended that the regulation involved, promoted legitimate health interests of the citizens of the State of Mississippi, and the argument was rejected (424 U.S. at 375). Here, there is no health, safety, education or anti-fraud basis for the statute. The only purported justification professed is the prevention of "destructive competition", a patently economic end which can never justify the curtailment of interstate commerce (See also Jurisdictional Statement, pp. 12-14).

4. The Commissioner Is Unable to Distinguish the Controlling *Baldwin* and *Hood* Decisions.

This Court has consistently held that a state has no power to prohibit the sale of goods in interstate commerce solely for the protection of local economic interests. *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511 (1935); *H.P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949). We have demonstrated that the attempt of the Court of Appeals to suggest that the Commissioner's admitted economic protectionism (in

prohibiting sales by appellant on the ground that they "would tend to a destructive competition for milk sales in a market already adequately served") is some type of "consumerism", does not change the fact that the identical argument was resoundingly rejected by this Court in *Baldwin* and *Hood* (See Jurisdictional Statement, pp. 10-16).

Seeking to distinguish *Baldwin*, the Commissioner urges that the enactment therein attempted "to affect or regulate" the "market structure of a foreign market" (Mot., p. 11). But, the Commissioner's action here had a far more egregious effect on transactions in New Jersey, than the regulation in *Baldwin* had on transactions in Vermont. Here the transactions were prohibited outright whereas in *Baldwin*, New York merely sought to regulate the price of milk purchased in Vermont for sale in New York (See also Jurisdictional Statement, pp. 14-16).

Finally, the Commissioner attempts to distinguish *Hood* by urging that there "a statute neutral on its face was applied in a patently discriminatory manner designed to favor a local milk industry" (Mot., p. 12). The purported distinction is non-existent. In *Hood*, the Commissioner denied the application of a Massachusetts corporation pursuant to Section 258-c of the New York Agriculture and Markets Law (the very statute at issue herein) for a license to construct a milk receiving depot in New York for shipment of raw milk to Boston on the ground that such an operation might have had "a tendency to deprive [local] markets of a supply needed during the short season" 336 U.S. at 529. This Court found the Commissioner's determination violated the Commerce Clause, holding (336 U.S. at 531-532):

> "Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin* v. *Seelig*, 294 U.S. 511.
>
> • • •

> *"In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competitors. This Court unanimously rejected the State's contention in the* Seelig *case and held that the Commerce Clause, even in the absence of Congressional action, prohibits such regulation for such ends."* (Emphasis added).

Thus, the only "discrimination" found by the Court in *Hood* was that which necessarily results from any attempt to protect local competition. As stated in *Panhandle E.P. Co.* v. *Michigan Public Service Comm.*, 341 U.S. 329, 337 (1951), *Hood* held that New York had "discriminated against interstate commerce *by prohibiting it because it would subject local business to competition.*" Here the Commissioner advances a rationale for his exclusionary action identical to the one rejected in *Hood*—namely that appellant's entry "would tend to a destructive competition for milk sales in a market already adequately served." (38a).

Unlike any case ever decided by this Court, if the judgment of the Court of Appeals herein is permitted to stand, this Court will have permitted a State to obstruct the flow of interstate commerce for the purpose of promoting local economic ends.

Conclusion

For the foregoing reasons and the reasons set forth in the Jurisdictional Statement, probable jurisdiction should be noted and the judgment reversed.

Dated: New York, New York
November 27, 1978

Respectfully submitted,

MICHAEL LESCH
Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Attorneys for Tuscan Dairy Farms, Inc., Appellant

Of Counsel
MILTON S. GOULD
MICHAEL LESCH
SANFORD A. BELL
DALE C. CHRISTENSEN, JR.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,

Appellant,

—v.—

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

DENIS MCINERNEY
CAHILL GORDON & REINDEL
Attorneys for Amicus Curiae The Great Atlantic & Pacific Tea Company, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Dated: October 10, 1978

Of Counsel:

THOMAS F. CURNIN
THORN ROSENTHAL

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

TUSCAN DAIRY FARMS, INC.,

Appellant,

—v.—

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

The Great Atlantic & Pacific Tea Company, Inc. ("A&P") hereby respectfully moves pursuant to Rule 42(3) of the Revised Rules of the Supreme Court for leave to file the attached brief *amicus curiae* in support of the Jurisdictional Statement in this case. The written consent of the attorney for the Appellant to the filing of this brief has been obtained, and a copy thereof has been filed with the Clerk of the Court. The consent of the attorney for the Appellee was requested but refused.

A&P is a party to a proceeding presently pending before the State of New York, Department of Agriculture and Markets, in which the same constitutional issue as presented by the instant case has arisen. A&P is seeking

a milk dealer's license to distribute milk from its processing plant in Pennsylvania to five of its own stores in Richmond County, New York. The license application is challenged exclusively on the ground that the issuance of the license would "tend to a destructive competition in a market already adequately served," and a reversal by this Court in the instant case would be dispositive of A&P's application.

The application of A&P was more vigorously contested than the application of the Appellant. While the hearings on the Appellant's application were held on two consecutive days, the hearings on A&P's application required eleven days over the course of seven months. It is believed that the brief which *amicus curiae* is requesting permission to file contains a more complete argument on the interrelationship between New York's procedure with respect to license applications and the commerce clause issue than will the Jurisdictional Statement.

Respectfully submitted,

DENIS MCINERNEY
CAHILL GORNDON & REINDEL
Attorneys for Amicus Curiae
The Great Atlantic & Pacific
Tea Company, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Dated: October 10, 1978

Of Counsel:

THOMAS F. CURNIN
THORN ROSENTHAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

TUSCAN DAIRY FARMS, INC.,

Appellant,

—v.—

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Question Presented

Whether a license to distribute milk in interstate commerce may be denied consistently with the Commerce Clause of the United States Constitution on the basis that "the issuance of the license will tend to a destructive competition in a market already adequately served?"

Statement of the Case

To avoid repetition, we adopt the Statement of the Case set forth in the Jurisdictional Statement. We also note:

(i) in the enforcement of the "destructive competition" provision ("destructive competition ground") of § 258-c of the New York Agriculture and Markets Law (McKinney 1972 and Supp. 1977-78) ("§ 258-c"), many prospective licensees, of which The Great Atlantic & Pacific Tea Company, Inc. ("A&P") is one,* have suffered even more protracted and burdensome hearings than did Appellant in the present case, and

(ii) for every Tuscan Dairy Farms, Inc. ("Tuscan") or A&P who seeks a license, there are numerous other potential out-of-state licensees who may be discouraged from even filing an application (or proceeding once it is filed) by the prospect of a hearing as lengthy and expensive as that experienced by A&P, with a potential outcome as fruitless as that experienced by Tuscan.

* A&P is seeking to service its own stores in Richmond County with milk and dairy products from its Fort Washington, Pennsylvania processing plant. Hearings have been concluded but no decision has been issued by the Hearing Officer.

THE QUESTION IS SUBSTANTIAL

I.

The Opinion of the New York Court of Appeals Is Flatly Inconsistent With Opinions of this Court.

A. Analysis Of The Opinion Below

In 1949, this Court, in effect, decided the present case when it decided *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949). The Appellee there, as in the present case, was the Commissioner of Agriculture and Markets in New York.

The relevant statutory provision in the present case, the destructive competition ground of § 258-c, was in pertinent part the statute in *Hood*. The action taken in each case was denial of a milk dealer's license on the destructive competition ground. The only arguable distinction between the present case and *Hood* is that Tuscan is seeking to import milk into New York, whereas the applicant in *Hood* was seeking to export milk from New York. This is a distinction without a difference—the *Hood* opinion relied extensively upon *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), in which certain restrictions upon import of milk into New York were held unconstitutional under the Commerce Clause, and the *Hood* court expressly noted that it was immaterial whether restrictions affected import or export. 336 U.S. at 531, 535. In the present case, therefore, as in *Hood*, this Court should reverse the New York Court of Appeals' affirmance of the denial of the license.

Hood and *Baldwin* are dispositive of the present case. Last term this Court cited *Hood* as follows:

> "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity

has been erected. See, *e.g., Hood & Sons* v. *Du Mond* . . . ." *City of Philadelphia* v. *New Jersey,* 98 S.Ct. 2531, 2535 (1978).

As noted even by the Court of Appeals in the opinion below, *see* 45 N.Y.2d at 224-26, under the decisions of this Court, *if* a legitimate local interest is found, then a balancing test is applied. *See City of Philadelphia* v. *New Jersey, supra,* 98 S.Ct. at 2535. Therefore, the threshold question, which we submit is dispositive in this case, is whether the destructive competition ground of § 258-c effectuates a legitimate local interest or "simple economic protectionism." *Id.*

The destructive competition ground serves simple economic protectionism. The text of the statute, specifically the word "competition", addresses an economic phenomenon. The Court of Appeals below attempted to avoid this obvious problem by arguing that the destructive competition ground is merely a means to a purportedly legitimate end, specifically, "maintenance of a balanced milk distribution structure for the protection of the consumer-public." The Court of Appeals emphasized that a balanced milk distribution structure was valuable "particularly" because it "provides 'service on retail home delivery routes and service to small volume wholesale customers' . . . which . . . serve consumer needs not met by supermarkets and warehouse-type outlets." 45 N.Y. 2d at 225-26. Thus, the interest which the destructive competition ground, as interpreted by the Court of Appeals, protects, apparently is continued service to some of the outlets patronized by people who buy milk but do not, or do not always, buy it at supermarkets. In short, the statute applies where the commissioner determines that, if a license is issued, certain consumers may not be able to obtain milk as conveniently as at present. At this point, the opinion of the Court of Appeals below squarely conflicts with opinions of this Court.

This Court held in *Baldwin* that the goal of maintaining a supply of milk to consumers may *not* permissibly be invoked to justify economic protectionism which burdens interstate commerce:

> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. *The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk;* the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Nebbia v. New York, supra. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. . . .
>
> "We have dwelt up to this point upon the argument of the state that economic security for farmers in the milk shed may be a means of assuring to *consumers* a steady supply of a food of prime necessity." (emphasis supplied) *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 522-23 (1935)

This passage is dispositive of the argument of the Court of Appeals. It unequivocally holds that assurance of local supplies to *consumers* is not a "legitimate local interest" upon which to justify economic protectionism which burdens interstate commerce.

The Court of Appeals in its opinion below stated, "One looks in vain in *Hood* for any translation of economic disadvantage to dealers into injury to consumers." 45 N.Y. 2d at 229. This Court in *Hood*, however, explicitly rejected the argument that assurance of supplies to consumers constitutes an excuse for burdening interstate commerce. In discussing *Baldwin*, the *Hood* opinion alluded to the above quoted passage from that case:

> "In neither [*Baldwin* nor the present, *i.e.*, *Hood*] case is the measure supported by health or safety considerations but solely by protection of local economic interests, *such as supply for local consumption* and limitation of competition." (emphasis supplied) *H.P. Hood & Sons, Inc.* v. *Du Mond, supra*, 336 U.S. at 531.

We respectfully suggest that the word "consumption" in the above quote is derived from the same root as "consumer", *i.e.*, "consume", and that the New York Court of Appeals therefore was in error when it argued that *Hood* does not "mention or address the subject of consequences to consumers or consumer protection." 45 N.Y. 2d at 229-30.

The opinion of the Court of Appeals below discusses the absence of evidence in the record which tends to show discrimination against applications for licenses to ship milk in interstate commerce as opposed to intrastate commerce. *See* 45 N.Y. 2d at 226-28. As noted above, *supra*, pp. 3-4, where only protection of economic interests is served, legislation burdening interstate commerce is virtually *per se* unconstitutional, irrespective of "balancing" or "even-handedness". Further, the "non-discrimination" defense was explicitly rejected in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951), where this Court held an ordinance unconstitutional under the interstate commerce clause despite the absence of discrimination:

> "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n. 4.

Finally, "evenhandedness" was also deemed irrelevant in *Hood* because apparently there was no proof that the Commissioner discriminated in his application of the destructive competition ground against interstate commerce. The relevant comparison in *Hood*, we submit, was between license applications seeking to (a) ship milk from Greenwich, New York (where the applicant proposed to build its plant) to other states and (b) ship milk from Greenwich, New York to areas in New York; this Court in *Hood* did not discuss facts pertaining to this comparison, and the dissenting opinions indicate that the record in that case was bereft of facts bearing upon this comparison or upon the effects of destructive competition ground upon interstate commerce. 336 U.S. at 547-49 (Black), 573-74 (Frankfurter).

B. This Court Should Hold The Destructive Competition Ground Unconstitutional On Its Face

While a summary reversal on the authority of *Hood* and *Baldwin* would seem appropriate in the present case, an opinion holding the destructive competition ground unconstitutional on its face would be advisable so that the New York courts cannot conjure up new spurious distinctions of *Hood* and *Baldwin*.

The interpretation by the New York Court of Appeals of the destructive competition ground to promote a "balanced milk distribution structure" appears to be a shift in emphasis from prior law, which shift presumably was designed to confuse the Commerce Clause issue as much as possible. For example, in another recent decision, the

Court of Appeals emphasized protection from competitive injury as the purpose of the destructive ground in holding that competitors of a new licensee have standing to obtain judicial review of the Commission's determination to issue the license. *Dairylea Coop., Inc.* v. *Walkley*, 38 N.Y.2d 6, 11, 339 N.E.2d 865, 868, 377 N.Y.S.2d 451, 455-56 (1975).

The destructive competition ground usually has been interpreted so that denials of license applications were confirmed where there existed excess capacity among extant competitors because, said the courts, under such circumstances the issuance of the license would be financially deleterious to such competitors. For example, a denial of a license was confirmed on the following basis:

> "In the situation here presented, the additional competition resulting from the establishment of a new plant would necessarily tend to a destructive effect, within the meaning of the statute. As the commissioner pointed out in his findings, the new plant would divert milk from existing plants, which were already operating below their capacity, and thus would necessarily result in an increase of their unit cost of operation and would tend to undermine their stability and their ability to continue to operate upon a profitable basis." *Friendship Dairies, Inc.* v. *Du Mond*, 284 App.Div. 147, 154, 131 N.Y.S.2d 51, 57 (3d Dep't 1954).*

* *See also Perky Milk Corp.* v. *Wickham*, 15 App.Div.2d 624, 625, 222 N.Y.S.2d 612 (3d Dep't 1961); *Kotcher* v. *Carey*, 3 App.Div.2d 957, 958, 162 N.Y.S.2d 708, 709-10 (3d Dep't), *appeal dismissed*, 3 N.Y.2d 879, 145 N.E.2d 180, 166 N.Y.S.2d 503 (1957); *Ginsburg* v. *Carey*, 2 App.Div.2d 733, 152 N.Y.S.2d 856, *reargument denied*, 2 App.Div.2d 824, 154 N.Y.S.2d 1017 (3d Dep't 1956); *Grimsteed* v. *Carey*, 1 App.Div.2d 985, 986, 150 N.Y.S.2d 657, 658-59 (3d Dep't 1956); *cf. Dusinberre* v. *Noyes*, 284 N.Y. 304, 31 N.E.2d 34 (1940); *but cf. Dairymen's Coop. Ass'n* v. *Du Mond*, 282 App.Div. 69, 74, 121 N.Y.S.2d 857, 863 (3d Dep't), *appeal dismissed*, 306 N.Y. 595, 115 N.E.2d 825 (1953).

As a consequence, extant competitors have been able to expand their capacity to meet all demand by the simple expedient of maintaining some excess capacity to prevent putative new entrants from obtaining licenses.* *Cf. United States* v. *Aluminum Company of America*, 148 F.2d 416, 430-31 (2d Cir. 1945). This also provides an umbrella for inefficiency, as there is no actual or potential competition from more efficient companies not licensed to service Richmond County.

To hold the destructive competition ground unconstitutional on its face would entail little more than a reaffirmation of the holding in *Baldwin* that protection of local economic interests cannot be justified on some legitimate pretext:

> "There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. . . . Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." *Baldwin* v. *G.A.F. Seelig, Inc., supra*, 294 U.S. at 523-24.

We submit that the relationship between the destructive competition ground and any legitimate interest is too remote to justify obstructions to interstate commerce.

* Extensive hearings on A&P's application disclosed that three of the five processors who actually serviced Richmond County had expanded their capacity within the two or three years prior to the hearing, one (Dellwood Foods, Inc.) by approximately 100% (Dellwood, A&P Tr.II-75-76; Dairylea Coop., Inc., A&P Tr.I-105-09; Queens Farms Dairy, Inc., A&P Tr.I-114-16, 121). A fourth processor (Honeywell Farms, Inc.) had recently modernized its plant (A&P Tr.I-196-97). The fifth processor did not testify.

II.

Even Were License Applications Granted Routinely, New York's Licensing Procedure Impermissibly Burdens Interstate Commerce to Further Local Economic Interests.

This case also merits a hearing by this Court because New York has adopted a licensing procedure which is so forbidding that most prospective licensees would be foolish to apply and so lengthy that the preclusion of distribution during the pendency of the application itself is unconstitutional. Obviously, if this Court holds that licenses to distribute milk in interstate commerce cannot be denied on the destructive competition ground, New York will no longer be able to hold hearings on applications therefor on this pretext.

The New York Department of Agriculture and Markets has promulgated "Milk Dealer Licensing Policy and Procedures." These procedures provide that, in virtually any case, if any prospective competitor of an applicant objects that the issuance of the license would tend to a destructive competition, a hearing must be held:

> "[Except in certain limited instances,] no application for a milk dealer's license or extension thereto will be granted until considered at a public hearing if any milk dealer licensed for the county, counties or an area therein submits in writing within the period established pursuant to paragraph (c) above a substantive reason or objection (i.e., it would lead to destructive competition in an area adequately served; it is against the public interest or the license or extension should not be granted by reason of the applicant's character, experience or financial responsibility) to issuance of such license or extension."

As discussed above, *supra*, pp. 7-9, the New York courts interpret the destructive competition ground to protect extant competitors; in order to force a hearing, therefore, prospective competitors essentially need only to allege that the grant of the license would be detrimental to their business.*

The hearings can be burdensome. A&P, like Tuscan, applied for a license to service Richmond County. Specifically, A&P is seeking to service its own five retail stores in Richmond County from its own milk processing plant in Fort Washington, Pennsylvania. A&P's application was more vigorously opposed than Tuscan's. Hearings on A&P's application covered eleven days spread over seven months, with sessions in New York City and Albany. During the first three days, the Department produced six witnesses, two of whom were expert witnesses, and A&P's present supplier produced an additional witness.** Thereafter, A&P produced one factual and one expert witness.*** The Department responded with four days of expert testimony. The Department, which purports to be neutral, vigorously opposed A&P's application at the hearing, even to the extent of introducing exhibits which Professor Stephen G. Breyer of Harvard Law School, A&P's

---

* A&P's application is being challenged principally by its present supplier, who fears not even competition, but simply loss of A&P's business. This supplier holds 50.9% of the Richmond distributors' market, and its dairy processor (Honeywell Farms) supplies 59.3% of that market. (A&P Post-Hearing Memorandum, tables 2 and 3).

** The dairymen's drivers' union also produced a witness, who testified in opposition to the application.

*** A lawyer representing A&P also testified with respect to preparation of certain exhibits.

expert witness, characterized under oath as "terribly misleading, extremely misleading" and "not just misleading, but seriously misleading" (A&P Tr. X-25, 28). This hearing, obviously, required representation by counsel and was very expensive for A&P (and the taxpayers of New York). Such hearings may deter a large class of prospective suppliers* even from submitting or thereafter pursuing license applications.**

Prospective licensees are precluded from distribution of milk during the pendency of the hearings. New York Agriculture and Markets Law § 257 (McKinney 1972 & Supp. 1977-78). The hearing procedure is lengthy. Tuscan filed its application on May 28, 1975.*** The hearing was held on July 15 and 16, 1975, and the adverse decision rendered by the Commissioner on May 3, 1976, almost a year after the filing of the application. A&P filed its application, also to serve Richmond County, on December 13, 1976. The hearing commenced, almost a year later, on November 15, 1977 (dates scheduled in September and October were unacceptable to A&P or the Commission). The hearing concluded on June 7, 1978 and, if Tuscan's experience is any guide, the application will be well into its third year before a determination is rendered.

---

* Depending upon the size of the facility, milk processing plants up to 250 miles from a market center may economically service that market. A.C. Manchester, "Market Structure, Institutions, and Performance in the Fluid Milk Industry," U.S. Department of Agriculture, Economic Research Service, Agricultural Economic Report No. 248, pp. 7-9 (1974).

** The Department's statistical information shows that applications to distribute milk at wholesale are several times more likely to be denied than any other category of applications and, further, that a large percentage of such license applications either are withdrawn or remain pending for long periods. (A&P Exhibit 41).

*** Tuscan applied to service the other four counties of New York City as well as Richmond, but agreed to postpone the hearings with respect to such other counties. This may be an example of the chilling effects of the prospect of having to suffer a hearing.

Even if a favorable determination is rendered, a competitor may obtain judicial review of the determination. *Dairylea Coop., Inc.* v. *Walkley*, 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451 (1975). If an adverse determination is rendered, a review proceeding is available in the New York Appellate Division (Third Department). Tuscan's experience indicates that such review is not speedy. Tuscan's adverse decision was rendered by the Commissioner on May 3, 1976; the decision of the Appellate Division affirming the Commissioner was rendered over a year later on August 4, 1977.

Licenses are valid only for one county. If A&P obtains the license it is seeking, it will be able to service its five stores in Richmond County.* A&P will not be able to service even one of its other stores in New York State unless and until it undergoes, from scratch, a similar hearing, and receives a favorable final determination, with respect to each county in which stores sought to be serviced are located.**

In sum, if any prospective competitor in any county sought to be serviced fears that the distribution of fluid milk in interstate commerce will hurt his sales or profits, *i.e.*, his economic interests, he can cause a hearing to be held which (i) will inconvenience the prospective licensee, perhaps discourage pursuit of the license and may result

---

* Between the time it filed its application and prior to the conclusion of hearings, A&P closed its sixth store in this area.

** The only ground upon which the A&P hearing was held was the destructive competition ground, *i.e.*, sanitation, moral character and the like were not challenged. Since, under the Department's present regulations, destructive competition is determined on a county-by-county basis, *see* New York Agriculture and Markets Law § 253(5) (McKinney 1972), 1(A) N.Y.C.R.R. § 27.1, a favorable ruling with respect to one county on the destructive competition ground is of no precedential value with respect to any other county.

in denial of the license, and (ii) in any event, will delay the entry of the applicant for perhaps two, three or more years. Each of these consequences constitutes an impermissible burden upon interstate commerce. If this Court holds unconstitutional the destructive competition ground, the principal* pretext for this hearing procedure will be removed.

CONCLUSION

The question presented by this appeal is substantial, and we urge this Court to note probable jurisdiction.

Respectfully submitted,

DENIS MCINERNEY
CAHILL GORDON & REINDEL
Attorneys for Amicus Curiae
The Great Atlantic & Pacific
Tea Company, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Dated: October 10, 1978

Of Counsel:

THOMAS F. CURNIN
THORN ROSENTHAL

---

* Such hearings could also be held on various other issues under § 258-e (McKinney 1972 & Supp. 1977-78), *e.g.*, the applicant's financial responsibility, but (i) such hearings would not be held on a county-by-county basis, *see supra*, p. 13 n.**, and presumably would be relatively few in number and brief in duration, and (ii) the standing of prospective competitors to participate in such hearings and seek review of issuances of licenses would be in doubt. *Cf. Dairylea Coop., Inc.* v. *Walkley, supra.*

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

OBJECTION TO MOTION BY THE GREAT ATLANTIC & PACIFIC TEA CO., INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

THOMAS G. CONWAY,
Counsel to the Department
of Agriculture and Markets
of the State of New York
Building #8, Eighth Floor
State Campus
Albany, New York 12235
(518) 457-2775
Attorney for the Respondent-Appellee-Commissioner

JOAN A. KEHOE
of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
10 CENTER ST., BATAVIA, N. Y. 14020
716-343-0457, 716-244-1000

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

On Appeal From the New York State Court of Appeals

OBJECTION TO MOTION BY THE GREAT ATLANTIC & PACIFIC TEA CO., INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, the respondent-appellee objects to the filing of a brief *amicus curiae* by The Great Atlantic & Pacific Tea Co., Inc. (hereinafter referred to as "A & P"), on the grounds that A & P has not set forth any facts or questions of law, relevant to the disposition of this case, which have not

been presented adequately by the parties in the courts below, nor any reason for believing that such issues and question will not be adequately presented by the parties in this Court.

Statement

The appellee refused A & P's request for consent to the filing of an *amicus curiae* brief because it is clear that the issue involved herein will be adequately presented by the parties. The appellant, Tuscan Dairy Farms, Inc. (hereinafter referred to as "appellant" or "Tuscan"), skillfully and exhaustively presented every aspect of this case in the New York courts. A & P has not demonstrated, or even alleged, that the issue herein has not been adequately presented. It has not raised new questions of law nor any new facts relevant to the disposition of this appeal.

ARGUMENT

I.

A & P has not demonstrated that it would present relevant facts or issues of law which have not already been adequately presented by the parties; therefore, its motion to file an *amicus curiae* brief should be denied.

A & P adopts the appellant's statement of the case (2).* It then proceeds to reargue the appellant's position without adding any significant new dimensions to the appellant's presentation on the issue before the Court. The same cases relied upon by the appellant are cited as A & P merely rephrases the argument already set forth by Tuscan.** The few additional cases cited by A & P do not present unraised issues, or they have no relevancy to the matter now before the Court.

---

* Numbers in parenthesis refer to pages in A & P's motion or brief.

** The appellee's reply to the appellant's argument is set forth in the Motion to Dismiss Appeal, and to avoid repetition is not repeated herein.

A & P attempts to bolster the appellant's arguments by its inaccurate claim that the New York Court of Appeals views Agriculture and Markets Law § 258-c as aimed at protecting milk dealers from competition (8). In the case relied upon, however, the Court, in fact, recognized and emphasized the "overriding legislative purpose to prevent destructive competition" and to maintain "a healthy competitive atmosphere in the milk industry." *Dairylea v. Walkley*, 38 NY2d 6, 11-12, 339 NE2d 865, 869, 377 NYS2d 451, 456 (1975). And in the matter presently before the Court, the New York Court of Appeals explicitly found that the denial, pursuant to Agriculture and Markets Law § 258-c, of Tuscan's application for extension of its New York milk dealer's license to sell and distribute consumer-size packaged milk in Richmond County "did not have as its objective the economic protection of the milk industry of New York State, or even that of the County of Richmond." *Tuscan Dairy Farms v. Barber*, 45 NY2d 215, 225 (1978). Rather, the appellee's determination, under the statute, was found to serve the legitimate public interest purpose of maintaining a balanced milk distribution structure for the protection of the welfare of the consuming public. *Id.* at 225-226, 230.

A & P cites another New York case in its further attempt to show Agriculture and Markets Law § 258-c is aimed at protecting New York milk dealers (8). However, in the case relied upon, the Appellate Division of the New York Supreme Court explicitly recognized that the destructive competition provision is not for the purpose of advancing the interests of current licensees, but rather is aimed at protecting the public interest by assuring an adequate supply and service to meet the milk needs of the consuming public. *Friendship Dairies, Inc. v. Du Mond*, 284 App. Div. 147, 153, 155; 131 NYS2d 51, 56, 58 (3d Dep't, 1954).

U. S. v. Aluminum Company of America, 148 F2d 416 (2d Cir. 1945), cited by A & P (9), has no bearing whatsoever on this case. A & P's bare allegation that extant competitors maintain excess capacity to bar new licensees is totally unsupported. There is absolutely no evidence in the Tuscan record that capacity was expanded to prevent new entrants or to cover inefficiency. It was shown that two milk dealers had recently closed their processing plants, and the proprietor of one of the plants gave as the reason for closing the fact that volume was insufficient for efficient operations. (*Tuscan* Record in Court of Appeals, p. A121) Findings based on the A & P hearing have not been made. However, while the record contains testimony that some dealers modernized or expanded their plant facilities, A & P cites no evidence which would even indicate that such activity was to create excess capacity. There was testimony that expansion and modernization were undertaken in order to remain efficient and to handle existing production more efficiently. (A & P hearing transcript I, pp. 121, 197, 198)

A & P's claim that "excess capacity" has usually been the basis for denial of a milk dealer license application is also without any basis in fact. While capacity may be a factor to be considered in determining the ability of existing dealers to serve an area and in determining the impact of granting a particular license or license extension, there are many other factors to be taken into account. Thus, the total market conditions and potential impact of granting a license extension were fully evaluated in Tuscan, as well as in the cases cited by A & P (8, footnote).

II.

A & P's allegations of burdensome procedural delays in the State's administrative and judicial process have no support in the record and are contrary to fact.

In addition to rearguing Tuscan's position, A & P also makes the wholly unsupported allegation that many prospective milk dealer licensees have experienced "protracted and burdensome hearings" and conjectures that there are "potential out-of-state licensees who may be discouraged from filing a license application" (2).

The vast majority of hearings to consider applications for milk dealer licenses, or extensions thereof, are commenced and concluded in one day. The hearing to consider the appellant's application was concluded in one day. (Tuscan did request and was granted an additional hearing session, but subsequently notified the Department that it had no further evidence to present.)

The duration of the A & P hearing is not at all typical of a milk dealer licensing hearing. In fact, it is unique. A & P chose to present voluminous evidence, calling three witnesses who testified at length over a period of five days. A & P also conducted extensive cross-examination of witnesses called by the Department or other participants. At the Tuscan hearing nine Department witnesses testified, and the hearing was still concluded in one day.

The period of time over which the A & P hearing took place is also most unusual. The Department was prepared in June, 1977, to schedule a hearing to consider A & P's application. Following discussions with A & P's representative, the hearing date was set for September, rather than August, to accommodate A & P's schedules. In September, the department agreed to postpone the hearing to October 5. The October date

was subsequently adjourned to November, at the request of A & P. The hearing was commenced in November and scheduled to resume on an agreed upon date in December. However, due to conflicts in the schedule of A & P representatives, the December date for continuing the hearing was postponed until January, 1978. The remaining hearing sessions were scheduled on dates mutually agreeable to the parties. Thus, if the hearing was protracted, it was not because of the statute, on its face or in its application, but due to A & P's own delay.

Similarly, A & P's complaint concerning the time taken for judicial review of the Tuscan determination by the Appellate Division of the New York Supreme Court is totally without merit (13). While Tuscan commenced its proceeding for judicial review in June, 1976, it did not file and serve the record and its brief until March 25, 1977. Thereafter, the appellee-Commissioner promptly filed his brief, and the matter was argued before the Appellate Division on May 24, 1977. Thus, here again it is obvious that the delay referred by by A & P was not occasioned by the statute or the application of the statute, but rather by the applicant itself. It is also clear that the alleged delays claimed by A & P have no relevance to the disposition of the matter before the Court.

A & P's further allegation that potential out-of-state licensees may be discouraged from filing an application is so vague and speculative as to be totally meaningless. A & P has not cited one dealer who has been allegedly so discouraged. It is important to note again that Tuscan reviewed Department records at great length in its effort to support its original allegation that out-of-state dealers were discriminated against in the administration of Agriculture and Markets Law § 258-c (See p. 8 of Motion to Dismiss Appeal). Following extensive examination of Department records by its attorneys, however, the appellant abandoned this claim. *Id.* In fact,

there are many milk dealers from other states who are licensed as New York milk dealers, including the appellant itself which has been licensed in New York for over 20 years. (*Tuscan* Record in Court of Appeals, p. A29)

As demonstrated above, it is clear that A & P has not set forth additional questions of law or facts relevant to the disposition of this case, and has not shown, or even alleged, that there will be other than adequate presentation of the issues by the parties.

Conclusion

For the foregoing reasons, A & P's Motion for Leave to File a brief *amicus curiae* should be denied, and its submitted brief should not be considered by the Court.

Dated: November 17, 1978, Albany, New York.

Respectfully submitted,

THOMAS G. CONWAY,
Counsel to the Department of
Agriculture and Markets of the
State of New York and
Attorney for Respondent-Appellee-Commissioner,
Room 813 - Eighth Floor,
Bldg. 8 - State Campus,
Albany, New York 12235,
Tel. No. (518) 457-2775.

Joan A. Kehoe,
of Counsel.